

No. 15998 ✓

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Southern Division

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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No. 3270

Plaintiff,

VS.

COMPLAINT

I.

II.

That at Nyssa, Oregon and on or about October 17, 1955 for a valuable consideration the defendants, C. A. Butcher and Alberta G. Morrow, who then and there was and now is a widow, made, executed and delivered to the plaintiff their certain promissory note in writing, wherein and whereby they jointly and severally promised and agreed to pay to

the order of the plaintiff at Nyssa, Oregon, on or before April 15, 1956, the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars, lawful money of the United States of America, with interest thereon in like lawful money at the rate of Six (6%) per cent per annum from the date thereof until paid, which note was in words and figures as follows:

October 17, 1955

\$7,300.00

On or before April 15, 1956 after date, for value received, we promise to pay to the order of James R. Yost at the First National Bank of Portland at Nyssa, Oregon Seven Thousand Three Hundred and 00/100 Dollars, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent per annum, from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorneys fees to be allowed in said suit or action.

C. A. BUTCHER,

ALBERTA G. MORROW.

III.

That at Nyssa, Oregon and on or about the 17th

day of October 1955 and coincident with the execution and delivery of said note and to secure the payment of the sums due and to become due thereunder according to the terms and tenor thereof, the defendant, C. A. Butcher, who was then and there the owner of the personal property hereinafter described, made, executed and delivered to the plaintiff his certain indenture of mortgage conditioned upon the payment of said note wherein and whereby he mortgaged to the plaintiff the following described personal property situate in the County of Canyon, State of Idaho, to wit:

460 Tons of ensilage

39 Tons of grain

30 Tons of straw

40 Tons of hay

A copy of which chattel mortgage is hereto attached, marked Plaintiff's Exhibit A, and made a part of;

IV.

That said Chattel Mortgage was duly acknowledged by the maker thereof so as to entitle the same to be placed of record and also thereafter on October 20, 1955 filed his record in the office of the County Recorder of Canyon County, Idaho and appears of record therein as instrument No. 426919;

V.

That the said Chattel Mortgage contained a clause wherein it was provided that in the event the maker should fail to pay said promissory note at the time the same should become due the condition

of said Chattel Mortgage would become broken and the holder thereof should be entitled to have the same foreclosed; that the said promissory note is now past-due and unpaid and although demand has been made upon the defendants to pay the same the defendants have not paid the sums due on the said promissory note, or any part thereof, except the sum of Eight Hundred Seventy-nine (\$879.00) Dollars, which was paid on April 6, 1956 and the sum of One Hundred Sixty-three (\$163.00) Dollars, paid May 24, 1956, and by reason of the failure of said defendants to pay said note when the same became due the condition of said Chattel Mortgage has become broken and the plaintiff is entitled to have the same foreclosed;

VI.

That the plaintiff is now the owner and holder of said note and Chattel Mortgage and no proceedings have been had either at law or in equity for the collection thereof;

VII.

That there is now due, owing and unpaid from the defendants to the plaintiff under the terms and provisions of said Chattel Mortgage and the note thereby secured, the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars together with interest on the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars from October 17, 1955 until April 6, 1956, at the rate of six (6) per cent per annum and interest on the sum of Six Thousand Four Hundred Twenty-one (\$6,421.00) from April 6, 1956 until May 24, 1956, at the rate of Six

(6) per cent per annum and interest on the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) from April 6, 1956 until date.

VIII.

That both the note above mentioned and the Chattel Mortgage, so executed by the defendant Butcher in favor of the plaintiff, contained a clause wherein it is provided that if suit or action be instituted to collect said note or foreclose said Chattel Mortgage a reasonable sum should be allowed the plaintiff as attorney's fees for such suit or action; that the sum of Six Hundred (\$600.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees in this action if the foreclosure of said Chattel Mortgage and collection of said note, be not contested; that if the foreclosure thereof or the collection of said note should be contested the sum of One Thousand (\$1,000.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees in this action and the plaintiff has become obligated to pay his attorneys a reasonable sum for their services herein rendered and to be rendered;

IX.

That the plaintiff does not know and cannot ascertain what portion of said mortgaged chattels is now in existence but is informed and verily believes and therefore alleges that practically all of said mortgaged personal property has been consumed by livestock feed by the defendant, Butcher, and is therefore no longer in existence and the plaintiff alleges that the defendant, Butcher, should

by order of this Court be required to disclose the amount and the whereabouts of any portion of said mortgaged personal property which is now in existence, and its location so that the value of said remaining personal property may be fixed and determined as a prerequisite to the entry of a deficiency judgment in this action;

Wherefore, the plaintiff prays judgment and decree of this Court as follows:

That the plaintiff have personal judgment against C. A. Butcher and Alberta G. Morrow, jointly and severally, for the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars together with interest at Six (6) per cent per annum upon the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars from October 17, 1955 until April 6, 1956 and together with interest on the sum of Six Thousand Four Hundred Twenty-one (\$6,421.00) Dollars at the rate of Six (6) per cent per annum from April 6, 1956 until May 24, 1956 and for interest upon the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars from May 24, 1956 until date of judgment herein rendered; for the sum of Six Hundred (\$600.00) Dollars as attorney's fees if the foreclosure of this action be uncontested and for the sum of One Thousand (\$1,000.00) Dollars as attorney's fees if said action should be contested; that it be judged and decreed that the payment of all of said sums is secured by the chattel mortgage hereinbefore in this Complaint described;

That the defendants be required to come into

court and disclose the existence and whereabouts of any portion of said mortgaged personal property which is still in existence;

That the usual decree be made for the sale of said personal property by the United States Marshal for the district of Idaho or by some Master appointed by the Court for such purpose according to law and the practice of this Court and that the benefits of such sale be applied to the payment of the amounts due the plaintiff as aforesaid;

That the value of said mortgage chattels still existing be fixed and determined;

That the United States Marshal or special Master execute to the plaintiff a certificate of sale of said personal property and that if the amount received on sale of said personal property, after paying the cost of sale, be insufficient to pay the amount due the plaintiff that the said United States Marshal or special Master conducting said sale in his return on such sale specify the amount of such deficiency and that a deficiency judgment be entered in favor of the plaintiff and against the defendants jointly and severally, for the amount of such deficiency not exceeding however, the difference between the value of said mortgaged personal property still remaining in existence and the amount of the judgment, which may be entered herein together with costs and accruing costs; that if it should be disclosed by the evidence that no part of said mortgaged personal property is still in existence that in lieu of the entry of a decree of foreclosure and sale there

be entered a judgment in favor of the plaintiff and against the defendants, and each of them jointly and severally, for the amount found due upon said promissory note together with costs and attorney's fees to be fixed and determined in this action;

That the plaintiff have judgment for his costs and disbursements herein expended and for such other and further relief as to the Court may seem meet and equitable in the premises.

/s/ JAMES B. DONART,

/s/ GEO. DONART,

Attorneys for the Plaintiff.

EXHIBIT "A"

[Form No. 192—Chattel Mortgage—Long Form.]

This Indenture, made the 17th day of October, 1955, between C. A. Butcher of Route 2, Parma, County of Canyon, State of Idaho, and Alberta G. Morrow of Cottonwood, County of Idaho, State of Idaho, the parties of the first part, and James R. Yost of Nyssa, County of Malheur, State of Idaho, party of the second part,

Witnesseth, That the said party of the first part, for and in consideration of the sum of Seven Thousand Three Hundred and 00/100 (\$7,300.00) Dollars, received by the parties of the first part, do grant, sell and convey unto the said party of the second part, certain goods and chattels now being in Lots 3 and 4 and Lots 1 and 8 of the Old Idaho Land Co., in Sec. 19, Twp. 6 N., Rge 5, W.B.M. in

Exhibit "A"—(Continued)

Canyon County, State of Idaho, and described as follows, to wit:

460 ton Ensilage;
39 ton Ear Corn;
30 ton Grain;
40 ton Straw;
90 ton Hay

To Have and To Hold the said goods and chattels unto the said party of the second part, his executors, administrators or assigns forever.

Provided, nevertheless, and these presents are on the express condition that if the said parties of the first part, their executors, administrators or assigns shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of Seven Thousand Three Hundred and 00/100 (\$7,300.00) Dollars, and interest thereon at the rate of 6 per cent, per annum in accordance with the terms of a certain promissory note, of which the following is substantially a copy:

October 17, 1955

\$7,300.00

On or before April 15, 1956 after date, for value received, we promise to pay to the order of James R. Yost at The First National Bank of Portland at Nyssa, Oregon, Seven Thousand Three Hundred and 00/100 Dollars, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent per annum,

Exhibit "A"—(Continued)

from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

/s/ C. A. Butcher,

/s/ Alberta G. Morrow.

No.....

Form No. 216—Note.

and all such further sums as may hereafter be advanced to or for the account of the parties of the first part or expended by the party of the second part for taxes, insurance, operating care, maintenance, preservation, handling, marketing, transportation, or otherwise, in connection with the property herein described, then these presents shall be void.

And the said parties of the first part do hereby covenant that the property herein described is owned by C. A. Butcher and Alberta G. Morrow and is free from all incumbrances, except as above stated; not to sell, assign, transfer or deliver said property, or any part thereof, to any other person, nor to permit the same, or any part thereof, to be seized, levied upon or attached; not to remove or

Exhibit "A"—(Continued)

permit the removal by any person of the said property, or any part thereof, from the location described herein; to care for, preserve and protect the said property from all hazards to which it may be subject; to pay at maturity all taxes, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said goods and chattels, and to keep the said property fully insured for a sum not less than \$7,300.00 during all such time, in one or more good and responsible fire insurance companies, against all loss or damage by fire; the loss or damage, if any, to be made payable to the said party of the second part may, at his option, obtain such insurance and pay the premium therefor, and may pay all such taxes, liens and other incumbrances before or after the same shall have become liens upon said property, and likewise may, but shall not be obliged to make other and further loans, advances and expenditures to or for the account of the said parties of the first part, and all sums of money thus expended or advanced are hereby secured by these presents, and shall be repayable on demand from said parties of the first part to the said party of the second part, and the same shall bear interest from the date when made to the date of payment thereof at the rate of ten per cent per annum, unless at the time of the making of any expenditure or advancement the parties shall agree in writing for the payment of interest at some other rate.

If default be made in the payment of any sum, moneys or indebtedness now or hereafter secured

Exhibit "A"—(Continued)

hereby, or any part thereof, or the interest thereon, or if any of the covenants, conditions or agreements herein mentioned be not kept and performed, or if any representation herein made be false in any respect, or if any of the said property be sold, assigned, delivered, seized, attached, or levied upon, or abandoned, or if said property shall so decrease in value as to impair the security afforded hereby, or if the parties of the first part (or either of them, if there be more than one) shall be or become bankrupt or insolvent or a receiver shall be appointed in any proceeding with authority to take, hold or manage any of the property of such party, then, in any of said events, the party of the second part may elect and shall have the right and power, personally or by agent, to enter upon any place where the property herein described, or any part thereof, may be and take possession thereof and remove the same, with or without legal process, and, in addition thereto, the whole of the indebtedness hereby secured shall, at the option of the party of the second part, thereupon become due and payable without notice, although the time expressed for the payment thereof shall not have arrived. Party of the second part may, at any time thereafter, and from time to time, sell and dispose of the property hereby mortgaged, or any part thereof, at public auction, upon giving notice thereof in one publication of any newspaper published in said County and State not less than one week prior to the time set therefor, or upon giving such notice as is required by law for

Exhibit "A"—(Continued)

the sale of personal property upon execution, or at private sale, with or without notice; and out of the moneys arising therefrom to retain and pay all costs and expenses which may have been incurred in possessing, searching for, taking, keeping, caring for, handling, transporting and selling said property, or any part thereof, and all the obligations, of every kind and nature, secured by this mortgage, including a reasonable sum as attorney fees, whether such foreclosure is completed or not, rendering the overplus unto the parties of the first part. In any or all of the events aforesaid, the party of the second part may elect to foreclose this mortgage in an original suit to be brought therefor, in which event a receiver may be appointed to take possession of the property herein described during the pendency of the foreclosure proceeding; and in any such suit, the parties of the first part shall pay such sum as may be adjudged reasonable for plaintiff's attorney fees and the same shall constitute a lien upon the property herein described; but until such time as possession is taken by the party of the second part, or by a receiver under the terms and conditions hereof, the parties of the first part shall continue in possession of said property.

All remedies herein specified shall be considered as optional and cumulative and not as a waiver of any other right or remedy which would otherwise exist at law or in equity for the enforcement of this mortgage, or the collection of the indebtedness secured hereby.

Exhibit "A"—(Continued)

Executed in the presence of

.....,

[Seal]

C. C. Butcher,

[Seal]

Alberta G. Morrow.

State of Oregon,

County of Malheur—ss.

We, C. A. Butcher and Alberta G. Morrow, being first duly sworn, say that we are the sole and exclusive owners of the property described in this mortgage and in the lawful possession thereof; that the same is paid in full, and that there are no incumbrances or liens of any kind whatsoever existing at this date against said property.

C. A. Butcher,

Alberta G. Morrow.

Subscribed and sworn to before me this 18th day of October, 1955.

Harold Henigson,

Notary Public for Oregon. My

Commission expires 9/3/59.

State of Oregon,

County of Malheur—ss.

Be It Remembered, That on this 18th day of October, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally

Exhibit "A"—(Continued)

appeared the within named C. A. Butcher and Alberta G. Morrow, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

Harold Henigson,
Notary Public for Oregon. My
Commission expires 9/3/59.

Endorsements: No. Chattel Mortgage (Form No. 192). C. A. Butcher et al., to James R. Yost.

State of Idaho,
County of Canyon—ss.

I certify that the within instrument was received for record at request of Harold Henigson on the 20th day of October, 1955, at 9:10 o'clock a.m., and recorded in book on page Record of Mortgages of said County, or filed under number '

Witness my hand and seal of County affixed.

S. S. Foote,
County Clerk-Recorder,
Lavona Sayre,
Deputy.

Fee \$.75

73-67

[Endorsed]: Filed July 25, 1956.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Come now the defendants and answer plaintiff's complaint as follows:

I.

Admit the allegations contained in Paragraphs I, II, III and IV.

II.

Deny the allegations contained in Paragraphs V, VI, VII, VIII and IX except that defendants admit that plaintiff is now in possession of a note and mortgage executed by defendants.

By way of an Affirmative Defense and Counterclaim against plaintiff the defendants allege:

I.

That on or about the 15th day of July, 1955, the plaintiff, James R. Yost, through the use of fraud and misrepresentation induced the defendant, C. A. Butcher, to enter into a contract with the plaintiff. That said fraud consisted of the plaintiff's misrepresentation that the plaintiff was the owner of four hundred (400) head of weaner and yearling cattle. That in truth and fact plaintiff was not the owner of four hundred (400) head of such cattle, but in truth and fact owned only approximately ninety-six (96) head of such cattle. That a copy of such contract is hereto attached, marked Defendant's Exhibit A, and by this reference made a part hereof.

II.

That on or about the 28th day of November, 1955, plaintiff Yost delivered to defendant, C. A. Butcher's ranch in Canyon County, Idaho, approximately three hundred ninety-six (396) head of aforesaid weaner and yearling cattle. That at the time of such delivery plaintiff Yost represented that he was the owner of said three hundred ninety-six (396) head of cattle. That in truth and fact plaintiff was not the owner of said three hundred ninety-six (396) head of cattle, but only owned approximately ninety-six (96) head of such cattle. Defendants are informed and believe and therefore state on the basis of such information and belief that one John Stringer was the owner of approximately three hundred (300) head of such cattle.

III.

That aforesaid contract provided that defendant, C. A. Butcher, should feed and care for said cattle for a period of not less than one hundred fifty (150) days.

IV.

That defendant, C. A. Butcher, cared for and fed said three hundred ninety-six (396) cattle on his ranch in Canyon County, Idaho, from November 28, 1955, until April 6, 1956.

V.

That on or about April 6, 1956, and in violation of the terms of said contract plaintiff Yost and one

John Stringer removed said cattle from defendant, C. A. Butcher's ranch. That such removal of said cattle constituted a breach of the said contract and prevented the defendant, C. A. Butcher, from feeding and caring for said cattle.

VI.

That defendant, C. A. Butcher, during the period of time between November 28, 1955, and April 6, 1956, expended and used feed, labor, equipment and property in feeding and caring for said cattle in the total value of Fourteen Thousand One Hundred Thirty-eight and 40/100 (\$14,138.40) Dollars.

VII.

That the note and mortgage referred to in plaintiff's complaint were made in connection with the aforesaid contract. That the moneys paid to defendants upon execution of said note and mortgage were used by defendants to purchase feed for the feeding of the cattle referred to in the contract. That plaintiff well knew for what purpose the moneys acquired on execution of said note would be used. That the said chattel mortgage referred to in plaintiff's complaint was upon feed which defendant, C. A. Butcher, intended to feed to said three hundred ninety-six (396) head of cattle. That the plaintiff well knew that defendant, Butcher, intended to and actually did feed the property covered by the chattel mortgage to said three hundred ninety-six (396) head of cattle which plaintiff Yost

had fraudulently misrepresented as belonging to plaintiff Yost.

VIII.

That defendants would not have entered into said contract, or executed said note or mortgage had they known that plaintiff was not the owner of the three hundred ninety-six (396) head of cattle. That defendants in the execution of the contract and the note and mortgage relied on plaintiff's representations that plaintiff owned said cattle and were not aware of the fraud and misrepresentation which had been practiced by plaintiff until on or about April 16, 1956.

IX.

That the defendants have made demand upon plaintiff for the value of the services rendered in the feeding and caring for aforesaid cattle. That defendants' said demand was in the amount of Fourteen Thousand One Hundred Thirty-eight and 40/100 Dollars (\$14,138.40) less Seven Thousand Three Hundred Dollars (\$7,300.00), or a net demand of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars (\$6,838.40). That plaintiff refused to comply with said demand. That there is now due and owing by plaintiff to defendant, C. A. Butcher, the sum of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars (\$6,838.40), together with interest thereon at the rate of six per cent (6%) per annum from the date of April 6, 1956.

Wherefore, defendants pray judgment and decree of this court as follows:

That the note and mortgage referred to and set forth in plaintiff's complaint be cancelled.

That the contract between plaintiff and defendant, C. A. Butcher, be decreed as rescinded.

That the court decree defendants have restitution of the value of services and property expended and used in the performance of the contract terms, less the face amount of the note.

That defendant, C. A. Butcher, have judgment against the plaintiff in the amount of Six Thousand Eight Hundred Thirty-eight and 40/100 Dollars (\$6,838.40) plus interest at six per cent (6%) per annum upon said sum from April 6, 1956, until date of judgment herein rendered.

That the plaintiff be required to disclose the whereabouts of the three hundred ninety-six (396) head of cattle.

That the defendants have judgment for their costs and disbursements expended herein and for such other and further relief as to the court may seem meet and equitable in the premises.

/s/ ALLAN G. SHEPARD,
Attorney for Defendants.

EXHIBIT "A"

AGREEMENT

This Agreement, made and entered into this 15th day of July, 1955 by and between James R. Yost, residing at Nyssa, Oregon, hereinafter referred to as the First Party, and C. A. Butcher, residing at Route 2, Parma, Idaho, hereinafter referred to as the Second Party, Witnesseth:

Whereas, the Second Party desires to feed certain cattle owned by the First Party for the purpose of fattening the same; and

Whereas, the First Party desires to have the Second Party feed said cattle upon the terms and conditions hereinafter set forth.

Now, Therefore, In Consideration of the Premises and the Mutual Covenants and Agreements Herein Contained, the Parties Hereto Contract and Agree as Follows:

1. That on or about the 15th day of November, 1955, the First Party shall deliver approximately four hundred (400) weaner and yearling cattle at the farm of the Second Party situated in the County of Canyon, State of Idaho, and more particularly described as Lots 3 and 4 and Lots 1 and 8 of the old Idaho Land Company, all in Section 19, Township 6 North, Range 5, W.B.M., where said cattle shall be fed and cared for by the Second Party.

2. That the Second Party shall care for and full feed said cattle at his own expense from the date

Exhibit "A"—(Continued)

of their delivery for a period of not less than one hundred and fifty (150) days, or until returned to the First Party, it being understood and agreed that the Second Party will take care of and full feed said cattle and return them to the First Party in such numbers and at such dates as the First Party shall determine they are ready for sale or other disposition.

3. As full and complete compensation for furnishing feed and caring for and full feeding said cattle, and furnishing all facilities therefore, the First Party agrees to pay to the Second Party fifteen (15) cents per pound for entire gain per animal provided said cattle are fed a minimum of 150 days, it being understood that the gain in weight to be paid for will be the difference between the total inbound and outbound weights of said cattle less losses sustained during said feeding period, as hereinafter provided.

4. The Second Party agrees to receive said cattle on the same day the First Party receives them from his seller, and the Second Party agrees to accept the weights paid for by the First Party, which such weights shall be the inbound weights.

5. Any and all losses of said cattle, for any cause whatsoever shall be borne equally by the parties hereto. The amount of such losses shall be determined by taking the average price of each animal at the time of purchase by the First Party, which average price shall be the basis for cost of

Exhibit "A"—(Continued)

each animal lost. The share of the Second Party's losses shall first be deducted from the value of the gain for which the Second Party shall be entitled to payment. In the event the gain shall be insufficient for such purpose the Second Party shall reimburse the First Party forthwith in the amount of all undeducted losses.

6. Upon completion of the feeding period or any sooner termination thereof the Second Party shall return said cattle to the First Party upon demand, and the latter shall thereupon have the same weighed out upon scales at Nyssa, Oregon, with a three (3%) per cent shrinkage, which latter weights shall be accepted by the Second Party as the outbound weight to be used in determining the gain for which the Second Party shall be entitled to payment.

7. The Second Party shall, at his own expense, furnish all necessary pasturage, feed (including ensilage, hay and grain) and all other usual facilities for the proper feeding and care of said cattle. The Second Party covenants and agrees to develop the feeding program until the daily ration shall be fifteen (15) pounds of ensilage, two (2) to three (3) pounds of grain and approximately five (5) pounds of hay or its equivalent for each animal.

8. The First Party shall pay to the Second Party upon execution of this agreement the sum of Eight Hundred and 00/100 (\$800.00) Dollars, receipt whereof is hereby acknowledged, said sum to rep-

Exhibit "A"—(Continued)

resent an advance against any net gain payments to be made by the First Party and to be deducted from the first gain payments payable to the Second Party. The Second Party shall be entitled to payment of his net share of the gain promptly upon receipt by the First Party of the proceeds of the sale of said cattle subject of the within feeding program.

In the event the Second Party shall fail, refuse or neglect to fulfill the terms of this agreement or no net gain shall be realized on said feeding program, the Second Party shall forthwith repay to the *Second* Party said advance payment or such part thereof as may be unearned.

9. The First Party shall have the right to inspect said cattle at any and all times to see that they are given proper feed, care, and protection, and in the event that, in his opinion or the opinion of his proper representative, they are not being given such feed, care, and protection, said First Party shall have the right to withdraw said cattle on demand, and in that event shall pay the Second Party according to the above schedule of gain price, only for the weight, if any, added to said cattle to the time of the withdrawal, less the Second Party's share of losses and the cash advance as heretofore provided.

10. It is understood and agreed that the First Party retains title to said cattle at all times. It is further understood and agreed that the Second

Exhibit "A"—(Continued)

State of Oregon,

County of Malheur—ss.

Be It Remembered, That on this 15th day of July, A.D., 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named James R. Yost and C. A. Butcher, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and seal as of the day and year last above written.

/s/ HAROLD HENIGSON,

Notary Public for Oregon. My

Commission Expires 9/3/55.

[Endorsed]: Filed August 30, 1956.

[Title of District Court and Cause.]ANSWER TO COUNTER-CLAIM
AND CROSS-COMPLAINT

Comes Now the plaintiff, James R. Yost, and answer the counter-claim and cross-complaint of the defendant as follows:

I.

Answering paragraph I of said counter-claim and cross-complaint, the plaintiff admits that a

contract was entered into between the plaintiff and the defendant, Butcher, on or about July 15th, 1955 and that a true copy of said contract or agreement is attached to said cross-complaint, but denies each and every other allegation in said paragraph contained;

II.

Answering paragraph II of said counter-claim and cross-complaint, the plaintiff admits the allegations therein contained down to and including the word cattle in line Four (4) of said paragraph and denies each and every other allegations in said paragraph contained, except in so far as said allegations may be admitted or qualified by affirmative allegation herein and in this connection alleges the facts to be that the plaintiff did not at any time represent to the defendant that he was the owner of 396 head of cattle; that the defendant, Butcher, at all times knew that approximately 300 head of said cattle were the property of the said John Stringer;

III.

Answering paragraph III of said counter-claim and cross-complaint, the plaintiff denies that the contract provided that the cattle should be fed for a period of not less than 150 days and in this respect alleges the facts to be that paragraph II of said contract, a copy of which is attached to said counter-claim, provides that said cattle shall be fed for a period of not less than 150 days or until returned to the first party, (plaintiff), it being understood and agreed that the second party, (defend-

ant), will take care of and full feed said cattle and return them to the first party, (plaintiff), in such numbers and at such dates as the first party (plaintiff), shall determine they are ready for sale or other disposition; that paragraph VI of said contract contains the following language: "Upon completion of the feeding period or any sooner termination thereof the Second Party shall return said cattle to the First Party upon demand,"; that paragraph IX of said contract contains the following language: "The First Party shall have the right to inspect said cattle at any and all times to see that they are given proper feed, care, and protection, and in the event that, in his opinion or the opinion of his proper representative, they are not being given such feed, care, and protection, said First Party shall have the right to withdraw said cattle on demand, and in that event shall pay the Second Party according to the above schedule of gain price, only for the weight, if any, added to said cattle to the time of the withdrawal, less the Second Party's share of losses and the cash advance as heretofore provided."

IV.

Answering paragraph IV of said counter-claim and cross-complaint the plaintiff admits the allegations therein contained;

V.

Answering paragraph V of said counter-claim and cross-complaint, the plaintiff denies each and

every allegation therein contained and in this connection alleges the facts to be that on April 6th, 1956 the plaintiff inspected said cattle and found that they were not being given proper feed, care and attention and also ascertained that the defendant had fed practically all of his feed and had neither feed nor money with which to purchase feed to enable him longer to feed said cattle and on said date it was mutually agreed between the plaintiff and the defendant and the said John Stringer, that said cattle should be turned back to the plaintiff and said cattle on said date were voluntarily returned to the plaintiff;

VI.

Answering paragraph VI of said counter-claim and cross-complaint, the plaintiff alleges that he has no knowledge, information, or belief upon the subject sufficient to enable him to answer the allegations therein contained, and placing his denial upon that ground denies each and every allegation in said paragraph contained;

VII.

Answering paragraph VII of said counter-claim and cross-complaint, the plaintiff admits the allegation therein contained down to and including the word cattle in line Ten (10) thereof; further answering said paragraph the plaintiff denies each and every other allegation therein contained with the following qualifications; The plaintiff knew that it was the intention of the defendant to feed

said hay to said cattle but does not know whether all of said hay was so fed or whether a portion thereof remains undisposed of and as security of the payment of said mortgage;

VIII.

Answering paragraph VIII of said counter-claim and cross-complaint, the plaintiff denies each and every allegation in said paragraph contained;

IX.

Answering paragraph IX of said counter-claim and cross-complaint, the plaintiff admits that the defendants made a demand upon the plaintiff for the payment of the sum of Six Thousand Eight Hundred Thirty-eight and 40/100 (\$6,838.40) Dollars and that the plaintiff has not paid the same or any part thereof to the defendants pursuant to said demand but denies each and every other allegation in said paragraph contained; further answering said paragraph IX the plaintiff alleges that on or about April 6th, 1956 or shortly thereafter the plaintiff and the defendant, Butcher, agreed upon the amount of money due the defendant, Butcher, under the terms of said written contract and the amount thereof was credited upon the note sued upon in this action, and the amount sued for in this action is the amount due the plaintiff from the defendant after crediting the defendant for the full amount due him for feeding and caring for said cattle.

Wherefore, plaintiff prays that the defendant

take nothing by said counter-claim and cross-complaint and that the plaintiff have judgment as prayed for in his original complaint.

DONART & DONART,
/s/ GEO. DONART,
/s/ JAMES B. DONART,
Attorneys for the Plaintiff.

[Endorsed]: Filed September 7, 1956.

In The District Court of the United States
District of Idaho, Southern Division

No. 3270

JAMES R. YOST, Plaintiff,
vs.

C. A. BUTCHER, and ALBERTA G. MORROW,
Defendants.

JUDGMENT

The above entitled action came on regularly for trial at Boise, Idaho, the 23rd day of October, 1957, Geo. Donart of the firm of Donart & Donart of Weiser, Idaho, appearing as attorney for the plaintiff and Allan G. Shepard and William R. Padgett both of Boise, Idaho, appearing as attorneys for the defendants;

Witnesses were sworn and examined and documentary evidence introduced. At the close of the plaintiff's case counsel for the defendant moved for a Judgment of Nonsuit and Dismissal in favor of the defendant Alberta G. Morrow, which Motion

was taken under advisement by the Court and at the close of the defendant's case was again renewed by defense counsel and said Motion was granted and the cause ordered dismissed insofar as it affected the said Alberta G. Morrow. After both sides had rested their respective cases the cause was submitted to the Court for consideration and determination.

The Court being fully advised as to the law and the premises makes and enters its Findings of Fact and Conclusions of Law and orders that Judgment be entered accordingly.

Now, Therefore, By virtue of the law and the premises and the Findings of Fact and Conclusions of Law, as aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

That the above entitled action insofar as it affects the defendant Alberta G. Morrow be, and the same is hereby dismissed;

That the plaintiff be, and he is hereby awarded judgment against the defendant C. A. Butcher in the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956; for the sum of Seven Hundred Fifty (\$750.00) Dollars, attorneys fees and for plaintiff's costs and disbursements herein expended and taxed at \$.....

Dated This 21st day of March, 1958.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

[Endorsed]: Filed March 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above Named Defendants, C. A. Butcher
and Alberta G. Morrow and to Allan G. Shep-
ard and William R. Padgett, Their Attorneys
of Record:

Notice Is Hereby Given That James R. Yost,
the plaintiff above named, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit from that portion of that certain Judgment
entered in this action on the 24th day of March,
1958, wherein and whereby it was adjudged and
decreed:

“that the above entitled action insofar as it
affects the defendant Alberta G. Morrow be and
the same is hereby dismissed.”

This appeal is taken upon all questions of both
law and fact.

Dated this 26th day of March, 1958.

/s/ GEO. DONART,

/s/ JAMES B. DONART,

Attorneys for the Plaintiff-
Appellant.

[Endorsed]: Filed March 29, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Answer and cross-complaint.
3. Answer to counter-claim and cross-complaint.
4. Judgment.
5. Exhibits 1 to 14 inclusive.
6. Notice of appeal of James R. Yost.
7. Designation of James R. Yost of contents of record on appeal.
8. Copy of docket entries.
9. Notice of appeal of C. A. Butcher.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 23rd day of April, 1958.

[Seal]

ED. M. BRYAN,
Clerk,

s/ By LONA MANSER,
Deputy.

In The District Court of the United States,
District of Idaho, Southern Division

No. 3278

JAMES R. YOST, Plaintiff,

v.

C. A. BUTCHER and ALBERTA G. MORROW,
Defendants.

REPORTER'S TRANSCRIPT

Before: Hon. Edward P. Murphy, Judge.

Appearances: For Plaintiff: Messrs. Donart & Donart, by George Donart, Esquire. For Defendants: William R. Padgett, Esquire, and Allan G. Shepard, Esquire. [1]*

Wednesday, October 23, 1957—10:00 O'Clock A.M.

The Clerk: James R. Yost versus C. A. Butcher and Alberta G. Morrow, for court trial.

The Court: You may proceed. I am familiar with the pleadings.

Mr. Donart: Plaintiff is ready. At this time, if the Court please, and I was just discussing with defense counsel, the fact that if we can have probably a 10 or 15 minute pre-trial interview we could probably shorten the testimony several times.

The Court: All right. Satisfactory?

Mr. Shepard: Satisfactory.

One further item, before we get to that, your

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Honor, may the record show the association of Mr. William R. Padgett as additional counsel for the defense in this matter.

The Court: It will be so ordered.

(PRE-TRIAL)

Mr. Donart: I believe your Answer admits execution of the note and mortgage. Am I correct in that?

Mr. Shepard: You are correct, sir.

Mr. Donart: Now, we allege in this case that the mortgaged property has all passed out of existence. It was mortgaged feed, that it has probably all been consumed by the defendants' livestock or otherwise. In other words, the [3] proof of whether or not any of the mortgaged property is still in existence, could we stipulate on that, whether it is or isn't? That is a matter within the defendants' knowledge, not within ours.

Mr. Shepard: If the Court please, the only stipulation that the defendants will be willing to make to that effect is that the feed that was the subject of mortgage was fed to the plaintiff's livestock.

Mr. Donart: We don't care whom it was fed to. We just want to know if any of it is still in existence so that the judgment in this case will be one of foreclosure or whether it would be a judgment on the note.

If the Court please, I was going to say, we have a peculiar decision in the State of Idaho that if any part of mortgaged property is still in existence, even though it is completely worthless, that we still

have to foreclose the mortgage. And that's the purpose, your Honor.

The Court: You are willing to agree, are you not, Mr. Shepard, that the feed is no longer in existence?

Mr. Shepard: By far the substantial part. The only feed which would be in existence would be some ensilage which I believe is still on the ranch and which has become valueless through rot. The remainder of the feed was fed to the cattle.

The Court: Well, if Mr. Donart's statement to me [4] of Idaho is correct, it is still subject to a mortgage.

Mr. Donart: It may not have any value, but as I interpret the case of York versus Roberts, that if it still exists—In that case it was proven that the mortgaged property had no value, the Court ruled that the mortgage should have been foreclosed.

If there is some ensilage down there, and if you think there is some down there, we would just as soon send the Marshal down there and pile it up, notice it for sale, and have someone bid for thirty cents or whatever they would pay for it. Ensilage of that age wouldn't have value.

Mr. Shepard: No. I believe I stated, Mr. Donart, that the ensilage was of no value.

Mr. Donart: Well, that has nothing to do with it; if the ensilage is in existence——

Mr. Shepard: If your Honor please, I don't know how I can simplify the matter any further. I have disclosed what we know of the extent of it.

It would seem to me to be a sort of ridiculous thing to do, to take something that ostensibly has no value whatsoever and go through the tortuous procedure of having it bid in for thirty cents and the Marshal going down there and go through all the process that will be necessary.

Can't we stipulate that it is of no value, Mr. Donart? [5]

Mr. Donart: Well, couldn't we do it this way, couldn't we stipulate that it is unnecessary to foreclose the mortgage?

Mr. Shepard: If your Honor please, the pleadings in this case as the Court is well aware, taking the Complaint, was shaped up on the theory of note and mortgage. And now for the first time I am being asked to stipulate that we need have nothing to do with the mortgage here at all. I don't quite see how I can take that position. There is too much evidence here in relation to this so-called security, as to whether it has been exhausted, as to whether the debt has been satisfied in that matter or not. I don't see how I can stipulate we don't need to consider the mortgage at all. I mean, that's hardly the shape of the pleadings that we have prepared in this case.

I don't mean to be stuffy about it, and I am perfectly willing to stipulate to this effect, that if plaintiff does agree—does secure judgment and decree in this case, that the defendants are willing to agree that the remaining ensilage which is left is valueless and if foreclosed upon would result in merely a useless disbursement of funds.

The Court: May I suggest this, let's reserve that situation until the conclusion of the trial.

Mr. Donart: That is agreeable with us, your Honor.

Mr. Shepard: I will agree with that, your Honor. [6]

Mr. Donart: Now, there is a question of attorney's fees. In the event plaintiff prevails, we probably would have to call an attorney here from downtown. Would you be willing to stipulate that if the plaintiff prevails the Court may fix the amount of attorney's fees without the necessity of any proof as to whether it is or is not a reasonable fee? The Court will know how much work has been involved, the Court will be much better able to fix the fee than the attorney that was called up here as a witness.

Mr. Shepard: The defendant will so stipulate to that, your Honor, that the Court may fix the fee and that fees are secured.

We are ready to proceed.

Mr. Donart: Does the Court care for any opening statement?

The Court: No. [7]

Mr. Donart: Call Mr. Yost.

JAMES R. YOST

called as a witness in his own behalf, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record.

A. James Robert Yost.

Direct Examination

Q. (By Mr. Donart): Where do you live, Mr. Yost? A. I live at Nyssa, Oregon.

Q. Are you the plaintiff in this action?

A. I am.

Q. Are you acquainted with the defendants C. A. Butcher and Alberta G. Morrow?

A. I am.

(Whereupon, note marked for identification as Plaintiff's Exhibit No. 1; mortgage marked for identification as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Donart): The Bailiff is handing you two instruments marked Exhibit 1 and Exhibit 2. Will you look at No. 1 and tell us whether that is the note referred to in your complaint?

A. Yes, it is.

Q. Speak loudly enough so the Court can hear you. [8] A. Yes, it is.

Q. And look at Exhibit 2 and just roughly state whether that is a certified copy of your mortgage. A. Yes, it is.

Mr. Donart: We offer in evidence Exhibits 1 and 2.

The Court: Let them be received in evidence.

(Testimony of James R. Yost.)

The Clerk: Plaintiff's Exhibits 1 and 2 in evidence.

(Whereupon, Plaintiff's Exhibits 1 and 2 for identification were received in evidence.)

[Note: Plaintiff's Exhibit No. 1—Note, is the same as set out in Exhibit A at pages 11-12. Exhibit 2—Mortgage is the same as Exhibit A set out at pages 10-17.]

(Whereupon, checks marked for identification, respectively, Plaintiff's Exhibits 3 and 4.)

Q. (By Mr. Donart): You are now handed two checks marked for identification Exhibits 3 and 4. Were those checks issued by you?

A. Yes, they were.

Q. And are they the two checks that make up the principal sum stated in your note \$7300?

A. Yes, sir.

Mr. Donart: We offer in evidence Exhibits 3 and 4.

The Court: They will be received.

Mr. Shepard: If your Honor please, I would like to object to that. I haven't had an opportunity to see these checks. [9]

The Court: All right, the ruling is withdrawn pending your examination of the instrument.

(Counsel examining.)

Mr. Shepard: I will object to the admission of said checks on the grounds that the witness has stated that they represent payment of the principal

(Testimony of James R. Yost.)

sum of \$7300. Said checks reveal on their face they are made out to C. A. Butcher and the said checks were endorsed by C. A. Butcher, alone, without the defendant Morrow appearing thereon.

The Court: Well, I think that can be developed. I think Mr. Donart will develop what the defendant Butcher received out of it. You intend to do that, do you not?

Mr. Donart: Yes, we do.

The Court: I mean the defendant Morrow, what the defendant Morrow received out of it.

Mr. Donart: Could I see the checks?

Q. Now, these checks are made out only to the defendant Butcher. Could you explain why they were made out to Butcher instead of Butcher and Morrow?

A. I made the checks to Butcher for the feed that he was to furnish. That is, this is—the \$6500 was a loan that I took in advance of this contract from Mr. Butcher. Therefore, I made the check to him. The \$800 was a payment on the contract. Mrs. Morrow was asked to sign the notes to secure the mortgage. [10]

Q. Did she sign the note?

A. Yes, sir, she did.

Q. And, I believe, the mortgage, is that correct?

Mr. Shepard: I am going to object to that, unless some special foundation is laid to show this defendant knows and was present at the time she signed the mortgage or signed the note.

The Court: Do you know if she——

(Testimony of James R. Yost.)

Mr. Donart: You admit by your pleadings the execution of the note by those two defendants.

The Court: Is that true?

Mr. Shepard: We have admitted so. But I object to this witness stating something unless the foundation is laid.

The Court: Let's find out about it. Were you present when the note was signed?

A. No, sir. The note was signed in front of Mr. Hal Henigson, the attorney at Nyssa, in his office.

The Court: Is he your attorney?

A. Yes, sir, he was at that time.

The Court: You were not present?

A. I was not present, no, sir.

The Court: The objection will be overruled.

Q. (By Mr. Donart): Now you allege in your complaint that your credit on the note on April the 6th was the sum of [11] \$879?

A. That is correct.

Q. And what was that credit for?

A. That was a credit for the gain that Mr. Butcher had earned on his contract with me.

Q. On a contract with you?

A. That's right.

Q. And another item of \$163?

A. That was for some pasture that I had made arrangements with Mr. Butcher to leave the cattle on until I could find other grass.

Mr. Shepard: May I have that ruling clarified

(Testimony of James R. Yost.)

as to whether the checks have been admitted at this time? Otherwise, I wish to make an objection.

The Court: Make your objection.

Mr. Shepard: I believe that the witness has stated that these checks represent the principal sum payable under that note. I believe the face of one of the checks will indicate that sum of \$800 which, if I am correct, was drawn far in advance of the date of execution of the note. I would like to have the checks for just a moment to refresh my memory. If such is not the case I wish to withdraw the objection.

(Counsel examining.)

Mr. Shepard: We make the objection on that ground.

The Court: The objection is overruled. Let them [12] be received in evidence.

(Whereupon, Plaintiff's Exhibits No. 3 & 4 for identification were received in evidence.)

PLAINTIFF'S EXHIBIT No. 3

Contract on 400 head of cattle in feed lot.

No.

Nyssa Branch

THE FIRST NATIONAL BANK

of Portland

96-342

1232

(Testimony of James R. Yost.)

Nyssa, Oregon, July 15, 1955.

Pay to the Order of C. A. Butcher \$800.00/100
Eight hundred and no/100Dollars
/s/ James R. Yost

[Reverse side]

Endorsed: C. A. Butcher. Cancelled: Paid 7/16/55

PLAINTIFF'S EXHIBIT No. 4

Nyssa Branch No. ...

THE FIRST NATIONAL BANK

of Portland 96-342

1232

Nyssa, Oregon, Oct. 19, 1955

Pay to the Order of C. A. Butcher \$6,500.00/100
Six Thousand Five hundred and no/100 ..Dollars
for herd /s/ James R. Yost

[Reverse side]

Endorsed: C. A. Butcher. Cancelled: Paid 10/20/55

(Whereupon, a group of letters were marked
Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Donart): Will you look at a sheaf
of papers, a couple of letters or copies of the let-
ters. (Handing to witness). Do those letters ex-
plain the manner in which you arrived at your
credit of \$163 on May 24th?

Mr. Shepard: I am going to object, if your

(Testimony of James R. Yost.)

Honor please. The letters seem to be written by Mr. Padgett, here, to Mr. Donart. I don't know how this witness can testify to the import of those letters, what they explain.

Mr. Donart: Well, that is all they are going to be offered for, showing how he arrived at the figure of \$163, not to prove that is the correct figure.

The Court: To that limited extent, the objection is overruled and the witness may testify.

Q. (By Mr. Donart): Do those letters explain how you arrived at the \$163 figure?

A. Yes, sir, they do.

Mr. Donart: For that purpose we offer them in evidence.

The Court: They will be received for that purpose.

Mr. Shepard: May the record show our objection? [13]

The Court: It already shows.

(Whereupon, Plaintiff's Exhibit 5 for identification was received in evidence.)

Q. (By Mr. Donart): Have you ever received any further payments on that note?

A. No, sir, none.

Mr. Donart: Does the Court desire that we figure and make proof of the amount of accrued interest and principal or is that a matter than can be taken care as the case is decided?

The Court: I will take that up then.

Mr. Donart: You may cross-examine.

(Testimony of James R. Yost.)

Cross Examination

Q. (By Mr. Shepard): Mr. Yost, this one check which was drawn for \$800, what date was that issued on, if you remember?

A. I would like to see the check. (Examining.) It was written on the day that it states on the check, July 15 of '55.

Q. And that was long in advance of the execution of this note on October 17, was it not?

A. This was in advance of the note and mortgage, yes, sir.

Q. That was in advance, not an advance—it was in advance of the date of the note and mortgage? A. This was an advance.

Q. It was an advance? [14]

A. It was an advance on his contract, yes, sir.

Q. It was an advance on the contract?

A. Yes, sir, that's right.

Q. What contract was that?

A. I think you have a copy there of the contract that existed between Mr. Butcher and I.

Q. In other words, that \$800 was something which you paid him pursuant to the contract, is that correct? A. I don't quite get you.

Mr. Donart: Just a minute. That is objected to upon the ground the contract itself would be the best evidence of that.

The Court: I will overrule the objection.

A. I don't quite understand your question.

Q. (By Mr. Shepard): Did the contract which you entered into with Mr. Butcher require you to

(Testimony of James R. Yost.)

make up that payment of \$800? A. No, sir.

Q. It did not? A. No, sir.

(Whereupon, contract was marked Defendants' Exhibit No. 6 for identification.)

Q. (By Mr. Shepard): The Bailiff is handing you that which has been marked for identification 6, is that the contract you entered into with Mr. Butcher? [15] A. Yes, sir.

Q. Does your signature appear on the back page thereof? A. Yes, sir.

Q. Does Mr. Butcher's signature appear on the back page? A. Yes, sir.

Q. Your lawyer prepared that contract?

A. Yes, sir.

Q. Will you refer to Paragraph 8 of said contract, on Page 3, and state what that provides as far as a payment of \$800 is concerned?

A. (Reading).

Q. This check of \$800 then was paid pursuant to that contract, was it not?

A. It was paid at the time of the contract.

Q. It was paid at the time of the contract?

A. Yes, sir.

Q. This contract was executed on what date, Mr. Yost? A. July 15 of '55.

Q. And on what date was that \$800 check issued? A. July 15 of '55.

Q. And the contract calls for the payment of \$800 on the day of issuance of that—on the date of execution of that contract, is that correct?

(Testimony of James R. Yost.)

A. It says here that the "First Party shall pay"
—Yes, that's right. [16]

Q. And who is the First Party named in that contract? A. Myself.

Q. Yourself. So this particular check, which is Exhibit No. 4, was the check that you paid pursuant to that contract, is that right?

A. Yes, it was paid at the time of the contract, that's right.

Q. Was it paid pursuant to the contract, Mr. Yost?

A. Wait a minute, what do you mean by "pursuant"?

Q. Under the terms of the contract. Is that the check that you were required to pay under the contract?

A. I agreed to pay this \$800 on the contract. I wasn't asked to.

Q. And that's the \$800 that——

A. That's the \$800 that I agreed to give him.

Q. That is, it had nothing to do with the note or mortgage at all? A. Yes.

Mr. Donart: Just a minute.

A. Yes, it does.

Mr. Donart: That is objected to as asking for a conclusion of the witness.

The Court: If he knows, let him answer.

A. This \$800 was paid at the time the contract was drawn to be deducted from the gains put on the cattle at the [17] termination of the contract. That was understood.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): Mr. Bailiff, hand him Exhibit No. 5, please.

(Witness handed Exhibit 5.)

Q. (By Mr. Shepard): Mr. Yost, you stated that you are acquainted with Mrs. Morrow?

A. Yes, I met her, yes.

Q. And did you discuss the making of this note and mortgage with her?

A. No, sir, I did not. I merely requested her signature to be put on the note, if I——

Q. You requested that of her personally?

A. No, I did not. I asked Mr. Butcher.

Q. And did you request Mr. Butcher to have that done because Mrs. Morrow owned the land?

A. There wasn't sufficient security; I felt there wasn't sufficient security.

Q. Just answer the question. Did you ask her to put that on there because she owned the land?

A. Yes, I did.

Q. Now, getting to the feed which is set out in this mortgage, where was that feed at the time the mortgage was executed?

A. That feed was supposed to be on the Clayton Butcher property. [18]

Q. And it was, is that correct?

A. Apparently not, no.

Q. Well, do you know? A. I don't know.

Q. You don't know whether it was or not?

A. I know that he showed me some feed but how much I don't know.

Q. Who made up this mortgage?

(Testimony of James R. Yost.)

A. Mr. Hal Henigson, attorney at Nyssa.

Q. Whose attorney is he?

A. He was attorney acting on the case at the time.

Q. Was he your attorney?

A. Not necessarily, no. We just asked him to draw the contract.

Q. Who was "we"?

A. Myself. I guess I should say—I say "we"—I should say myself. I asked him to draw the contract.

Q. You asked him to draw the contract?

A. That's right.

Q. Did you ever go over to Mr. Butcher's place and inspect that feed?

A. I was there a number of times, yes.

Q. You were? A. That's right.

Q. What business are you in, Mr. Yost? [19]

A. What business am I in?

Q. Yes.

A. I'm a livestock loan appraiser for the First National Bank of Portland.

Q. A livestock loan appraiser?

A. That's right.

Q. And where do you reside?

A. I reside at Nyssa.

Q. And do you have occasion to travel extensively through the Nyssa area on both the Oregon and the Idaho side of the river? A. Yes, sir.

Q. And do you loan money on livestock for the bank? A. Yes, sir, that's right.

(Testimony of James R. Yost.)

Q. That is your business. How long have you been in that business? A. Five years.

Q. Five years. And who furnished the figures on this feed for Mr. Henigson to put in this mortgage?

A. Mr. Butcher furnished the figures to be put in the contract.

Q. Now are you talking about the contract or the mortgage? A. In the mortgage.

Q. In the mortgage.

A. Those are the figures that were given at the time that the mortgage was drawn. [20]

Q. Who gave those figures to Mr. Henigson, you or Mr. Butcher?

A. I believe Mr. Butcher gave them to him.

Q. When, if you know?

A. I don't know the exact time. No, I don't.

Q. You never gave them to Mr. Henigson yourself? A. No, sir.

Q. How many times would you estimate that you inspected the feed on Mr. Butcher's ranch?

A. Oh, I would say I was there probably at least once a month during the winter.

Q. I am talking about prior to the winter.

A. Prior to——

Q. Prior to the winter season 1955.

A. Prior to the contract or any of the——?

Q. Let's say between the dates July 5 and October 15, 1955, how many times were you on that ranch? A. Well——

Q. Your estimate.

A. It would be hard for me to say. I had some

(Testimony of James R. Yost.)

pasture bought from Mr. Butcher at that time for some cows that I owned and it would be hard to say exactly how many times I was there.

Q. Now, as a matter of fact, you had a discussion with Mr. Butcher about how many head of calves this feed would probably winter, didn't you?

A. Yes, I did. We discussed it.

Q. And you told him that you estimated that would feed 400 head of cattle, didn't you?

A. No, sir, I did not. Mr. Butcher——

Q. You did not?

A. Mr. Butcher asked me for 600 head of calves to start with, and then during our conversation, sometime later, some later date, he came back and said, "I don't believe I have enough feed for 600 but I can feed 400."

Q. Now, this contract which you entered into on July 15th with Mr. Butcher, that was a part and parcel of the whole deal, the note and the mortgage and the contract, they were all one deal, weren't they?

A. No. The contract——

Q. What was secured by the mortgage?

A. The feed.

Q. And where was the feed going to go?

A. He asked me for the \$6500 after the contract had been drawn.

Q. Where was the feed going to go?

A. The feed was to be fed.

Q. And you knew that? A. Yes, sir.

Q. And whose cattle was this to be fed to?

A. To mine but shortly after the mortgage was

(Testimony of James R. Yost.)

drawn, a man [22] by the name of Caruthers moved some big cattle in there and these cattle were fed out of the same ensilage pit that was supposed to be mortgaged to me, and these cattle were fed all winter.

Q. Did you visit those cattle during the winter?

A. Yes, sir, I did.

Q. Now, whose cattle were those 400 head that were furnished?

Mr. Donart: That's objected to as being immaterial.

The Court: Overruled.

A. Those cattle, according to my agreement——

Q. (By Mr. Shepard): Just state whom they belonged to, not according to any agreement. Whom did they belong to?

A. Those cattle, 96 head of them belonged to me, and 300 head of them belonged to John Stringer.

Mr. Shepard: I move the admission of Defendants' Exhibit No. 6, if your Honor please, at this time, that being the contract.

The Court: It may be admitted.

(Whereupon, Defendants' Exhibit No. 6 for identification was received into evidence.)

Q. (By Mr. Shepard): Mr. Yost, this contract was entered into on or about July 15 of 1955, is that correct? A. That's right.

Q. At that time who did you represent to be the owner of [23] the cattle delivered to Mr. Butcher?

A. This was discussed at great length at the time this contract—prior to this contract. Now, it

(Testimony of James R. Yost.)

was discussed with Mr. Butcher that I could not purchase all of the cattle and that I would guarantee him to get him 400 head of cattle to feed, which I did. I asked John Stringer to furnish the other 300, and he did. Now, these cattle were top quality first class feeder cattle that he received at the time that he took these cattle.

Q. Now referring to the second paragraph on the first page of this contract, does that provide that you were to own these cattle?

Mr. Donart: Just a minute. That is objected to upon the ground that the paragraph speaks for itself.

The Court: Objection sustained.

Q. (By Mr. Shepard): You signed this contract, did you not?

A. Yes, sir. Yes, I did.

Q. Are any representations in this contract contrary to those which you state now that you made to Mr. Butcher orally?

A. I believe here there is a misprint of where it says—one place here—I don't find it right now. But according to our oral agreement he knew that the cattle would be belonging to someone else.

Q. Did you agree orally that those cattle were to remain [24] —that title to those cattle was to remain in you at all times during the course of that winter?

A. According to the contract, I believe.

Q. I said "orally".

(Testimony of James R. Yost.)

A. I believe that the cattle was to remain in my title, yes, in my name, that's right.

Q. You were to have title all through the winter?

A. I was to have charge of the cattle, you might say; not title necessarily, no.

Q. Is that contrary to what is contained in this agreement?

Mr. Donart: We make that the same objection. Whether the "oral agreement" is contrary to the agreement would be best determined by the agreement itself.

The Court: Sustained.

Q. (By Mr. Shepard): Now 300 head of these cattle were Stringer's?

A. That's right, 300 head of them belonged to Stringer.

Q. And you had to deal with Stringer. Then you were to take charge of his cattle, is that correct?

A. That's right.

Q. You were acting then as his agent?

A. That's right.

Q. Or did you have a contract with him yourself?

A. No, sir, I had no contract with John Stringer. [25]

Q. As a matter of fact, did you not have a deal with Mr. Stringer that you were to get 3 cents or more per pound weight gain?

Mr. Donart: Now, just a minute. That is ob-

(Testimony of James R. Yost.)

jected to as immaterial, not within the issues of this case.

The Court: Objection sustained. Thus far Stringer does not appear as party litigant to this controversy.

Q. (By Mr. Shepard): In other words, Mr. Stringer just let you take these 300 head of cattle, is that correct? A. That's right.

Q. Did he ever transfer title of them to you?

A. No, sir. The cattle remained in his name.

Q. Did you have an obligation to return them to him?

Mr. Donart: The same objection, and it is improper cross examination, along with it.

The Court: Objection sustained. That is purely collateral. Whatever agreement this plaintiff had had with John Stringer is not an issue of this case.

Q. (By Mr. Shepard): Where did this \$7300 come from, Mr. Yost?

Mr. Donart: Same objection.

The Court: Same ruling; sustained. That is collateral.

Q. (By Mr. Shepard): Did you know what that feed was being used for during the winter? [26]

A. Yes, sir.

Q. And during that whole winter you inspected the cattle frequently, did you not?

A. Yes, sir, I did.

Q. At approximately what intervals, once or twice a week, perhaps?

A. No. I would say at least once a month.

(Testimony of James R. Yost.)

Q. And you were able to determine from the inspection as to what they were being fed and where the feed was coming from, is that correct?

A. Well, I wasn't able to determine how much feed was being fed them.

Q. Now, is Mrs. Morrow any party whatsoever to this contract, so far as you knew—the contract I am talking about?

A. No, sir, Mrs. Morrow doesn't appear on the contract.

Q. You didn't discuss that contract with her? She had no part of it insofar as you knew?

A. No, sir. Not at all.

Q. None of her cattle appear in that——

Mr. Donart: That is objected to as being immaterial. She signed the note. Now, whether he discussed it with her or not, whether she is an accommodation maker, the liability is there.

The Court: The objection is sustained.

Q. (By Mr. Shepard): Did you ever discuss with Mrs. [27] Morrow the feeding of this feed?

Mr. Donart: The same objection.

The Court: Overruled.

A. No, sir. Mrs. Morrow——

Q. (By Mr. Shepard): Just answer the question. Did you ever discuss it with her?

Mr. Donart: Just a minute. I believe if he wants to explain his answer——

The Court: He may explain his answer.

A. Mrs. Morrow was never talked to at all about this contract between Butcher and I. Anyone that

(Testimony of James R. Yost.)

had talked to her was strictly within her own relation or someone else that talked to her. All I did was insist that she be countersigned on the note before I made the loan.

Q. (By Mr. Shepard): Because she owned the property?

A. Because she owned the property, that's right.

Q. Did you ever discuss with her the feeding of this feed to yours and Mr. Stringer's cattle?

A. I don't quite understand, what do you mean did I ever discuss the feeding with her?

Q. During the winter that the cattle were being fed this feed, did you ever discuss that matter with her at all? I will put it this way: Did you ever see her during that winter, to your recollection?

A. Yes, I was over there several times and she was there. [28]

Q. She was there several times?

A. That's right.

Q. Where did she live, if you know?

A. I don't know her post office address.

Q. I beg your pardon?

A. I don't know her post office address.

Q. But she was there several times during the winter? A. That's right.

Q. Did you discuss the feeding of those cattle during that winter? A. I don't recall.

Q. Did you ever discuss the status of this feed, how much was left or anything of that type with her? A. I don't believe so.

(Testimony of James R. Yost.)

Q. Do you know the value of ensilage during that period of time?

A. I think so, yes.

Q. What was the approximate valuation of a ton of ensilage at that time?

Mr. Donart: Objected to as being immaterial, improper cross examination.

The Court: No, I think that might throw some light on the situation, especially in view of the fact that I am going to determine the value of that ensilage at the conclusion of the case. [29]

A. I would say the market value of that ensilage was \$7 a ton.

Q. (By Mr. Shepard): \$7 a ton?

A. \$7 a ton.

Q. Now, what was hay worth that winter per ton? A. As I recall, about \$20.

Q. As a matter of fact, hay sold during that winter for \$35 a ton, didn't it?

A. I don't know. I don't know if it did.

Q. Now, you are in the cattle business, you have been for five years. Now, do you know what hay sold a ton that year or don't you?

Mr. Donart: Now, just a minute. That is objected to unless he fixes the time. Hay would sell in the fall of the year at one price and if he got a shortage along in the winter it might sell for twice that.

The Court: Fix the time, Mr. Shepard.

Q. (By Mr. Shepard): Let's say in February of 1955, what did that hay sell for a ton?

(Testimony of James R. Yost.)

A. I can tell you what I bought hay for.

Mr. Donart: Just a minute. That is objected to as immaterial. The only place where the cost of hay would be material here would be what it was worth either at the time the contract was made or at the time the mortgage was entered into. [30]

The Court: Overruled. You may answer the question.

A. After I took these cattle back from Butcher——

Mr. Shepard: Just answer the question, please, Mr. Yost. Do you know the valuation of hay per ton?

A. This will answer your question fully, if you will let me proceed.

Q. In February—Excuse me—Go ahead.

A. When he was out of feed, I left my cattle in his yard for possibly two weeks. I purchased hay from his neighbor, chopped hay in the stack, for \$20. Does that answer your question?

Q. That was when? A. This was April.

Q. That was in April?

A. That was in April, yes, sir.

Q. Now, how about January of that year, do you know what hay was worth?

A. I would say probably about the same price.

Q. About \$20 a ton? A. I think so.

Q. Did you try to buy some hay in April from Mr. Fritz? A. From Mr. Fritz?

Q. Yes.

A. No, sir, I never talked to Mr. Fritz. [31]

(Testimony of James R. Yost.)

Q. I beg your pardon?

A. I never talked to Mr. Fritz.

Q. Did you ask Mr. Butcher to go to attempt to purchase some hay for you from Mr. Fritz?

A. I don't believe so, no.

Q. What was grain worth that winter per ton?

A. What kind of grain are you referring to?

Q. What kind of grain did you have in mind when you made up this mortgage?

A. I believe it was barley.

Q. Mixed with barley and what else?

A. What does the contract call for? (Witness examining.) Well, I think I can give you a price, if you will tell me what kind.

Q. I asked you what kind of grain you had in mind in this mortgage, when the mortgage was made up.

A. You will have to ask Mr. Butcher about that. I don't know what kind of grain he had. He just listed his grain.

Q. As a matter of fact, did you not go out there and inspect the granary?

A. No, sir, I did not.

Q. Let's say if the grain consisted of ground corn and barley, would you estimate that would be worth per ton?

A. Oh, 45 to \$50, somewhere near there.

Q. How about straw, did that have a going rate—about [32] \$10 a ton?

A. Straw? I don't recall he used any straw.

(Testimony of James R. Yost.)

Q. Was there straw covered in the mortgage here?

A. Was the straw covered in the mortgage?

Q. Yes.

(No response.)

Q. You have it there in front of you, Mr. Yost.

A. Would you give me that mortgage?

Q. I'm sorry, I thought you had it in front of you when I was questioning you.

A. (Witness examining.) I don't seem to find any place that straw is mentioned in here.

Q. Try looking on the first page of that mortgage, Mr. Yost.

A. (Witness examining.)

Mr. Donart: Well, both in the interest of time and otherwise we object to it upon the ground that the mortgage itself is the best evidence. I don't see where it is covered.

The Court: The objection will be overruled. However, do you have it there for reference, the reference you are asking for?

Mr. Shepard: Yes.

The Court: Then show it to him.

Mr. Shepard: I have attempted to point it out in the exhibit. It is on the first page. [33]

The Court: Point it out to him.

Mr. Shepard: May I?

The Court: Yes.

(Counsel showing witness.)

A. 40 tons of straw, yes.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): What was that worth a ton?

A. Well, I don't know exactly what straw was worth.

Mr. Donart: Pardon me. Did I misunderstand your question? What are you asking him about?

Mr. Shepard: What was straw worth.

Mr. Donart: Thank you. I thought you said "salt".

Q. (By Mr. Shepard): Did you understand me, Mr. Yost?

A. Straw, yes. I couldn't say what that straw was worth at this time. I don't know.

Q. How about the ear corn?

A. Ear corn at that time was probably worth about \$35 a ton.

Q. \$35 a ton? A. Yes.

Q. Was that ground?

A. No, that would be whole. I don't know what they had charged for grinding.

Q. \$4 a ton, would it be unreasonable, to grind it?

A. I think that is probably a little high. I don't know. I think they charged about \$3, two and a half to \$3. [34]

Q. Now, these cattle which were delivered pursuant to this agreement, these were supposed to come from Jordan Valley, is that correct?

A. The cattle themselves, no.

Q. The cattle themselves were supposed to come from Jordan Valley? A. No, sir.

(Testimony of James R. Yost.)

Q. They were not?

A. There was no designated place that these cattle were to come from.

Q. You didn't ever represent to Mr. Butcher where these cattle were to come from, is that correct?

A. Yes, I did.

Q. Where did you represent they were going to come from?

A. Coming from Oregon, where they were.

Q. Were they to be brought from to his place?

A. At the time the contract was drawn this was talked with Mr. Butcher, he knew he was going to get John Stringer's cattle from the time the contract was drawn, from then on he knew he would get John Stringer's cattle.

Q. So this written agreement meant absolutely nothing to either one of you, is that correct?

A. What do you mean it meant nothing to us?

Q. You state that he knew he was going to get John Stringer's cattle. This agreement proves that you were going [35] to furnish the cattle and you were going to own them?

A. No.

Mr. Donart: That is objected to upon the ground that the exhibit is the best evidence as to what it provides.

The Court: Objection sustained.

Mr. Shepard: And those cattle actually came from where, the 300 head that belonged to Stringer, if you know, where did those come from?

A. Those 300 head came from Stringer's ranch.

Q. Where? A. At Nyssa.

(Testimony of James R. Yost.)

Q. Is that a ranch or feed yard in Nyssa?

A. It is a feed yard.

Q. It is a feed yard? A. That's right.

Q. Were they on feed or pasture then?

A. They were on feed.

Q. They were on feed? A. Yes, sir.

Q. Did you see those cattle when they were unloaded out of Stringer's feed yard?

A. Yes, sir, I did.

Q. And they were absolutely full, weren't they?

A. No, not necessarily overly full. They were shrunk 3 percent in and they were shrunk 3 percent out. The same [36] weighing condition that cattle went in, they came out the same.

Q. They were shrunk 3 percent coming in?

A. That's right.

Q. That is the agreement for that?

A. I think that——

Q. Just answer the question, if you know.

Mr. Donart: Just a minute. Again, that is objected to upon the ground that the agreement is the best evidence of what it provides.

The Court: Sustained.

Q. (By Mr. Shepard): Did Mr. Butcher agree with you that those would be shrunk 3 percent coming in?

A. I think Mr. Butcher agreed with John Stringer that they would be shrunk 3 percent coming in and going out.

Q. Did Mr. Butcher have a contract with Mr. Stringer? A. No, he didn't.

(Testimony of James R. Yost.)

Q. You had the contract with Mr. Stringer?

A. That's right.

Q. So you had an agreement with Mr. Butcher how they would be shrunk coming in?

A. Yes, I did.

Q. What was that agreement?

A. 3 percent.

Q. Was that in writing? A. No, sir. [37]

Q. They would be shrunk going out 3 percent?

A. They would be shrunk going out 3 percent.

Q. That was in writing, was it not?

A. They were to be shrunk 3 percent going in.

Q. And the shrinkage, as far as the outbound weights of 3 percent, was in writing, was it not?

A. I believe that the shrinkage—the contract states that the same condition would be in and out. He received the cattle——

Q. Do you still have that copy of the agreement in front of you? A. Yes, sir, I do.

Q. All right. Would you point out to me where it says 3 percent shrinkage coming in in that contract?

Mr. Donart: The witness hasn't testified that the contract said that, and we would object to that.

The Court: He said he believed it did. Didn't you say that?

A. Pardon?

The Court: Didn't you say that you believed that the contract did provide for shrinkage of 3 percent in and for 3 percent out?

(Testimony of James R. Yost.)

A. I believe the contract says—. Can I read it to you?

The Court: Yes.

A. "Upon completion of the feeding period or any sooner [38] termination thereof, the Second Party shall return said cattle to the First Party upon demand and the latter shall thereupon have the same weight on outbound scales at Nyssa, Oregon with the 3 percent shrinkage, which latter weight shall be accepted by the Second Party as the outbound weight to be used in determining the gain for which the Second Party shall be entitled to payment."

The Court: All right. The objection is overruled.

Q. (By Mr. Shepard): Now, how about the inbound? You stated that you thought, if I understood you correctly, that you thought they were 3 percent shrinkage both inbound and outbound as far as the contract. Now, will you read the provision of the contract—. Does it provide for inbound weight?

A. The cattle were shrunk 3 percent in. That is what I said.

Q. When you say "shrunk 3 percent," what do you mean by that?

A. Well, shrinkage on cattle is a way of determining the fill that is in them. Now, 3 percent, any animal or any bunch of animals that is shrunk 3 percent, 3 percent of the gross weight of the cattle, that figure is deducted and that is your net weight of cattle.

(Testimony of James R. Yost.)

Q. Now, as far as the inbound weight is concerned, you [39] agreed with Mr. Butcher that the weight which you received when you bought them from your seller would be accepted by Mr. Butcher, did you not?

A. Yes, and those cattle were bought on a shrinkage, they were bought——

Q. And the cattle that you are talking about when you made that agreement with Mr. Butcher were the 400 head, is that correct?

A. Yes, any of the 400 head of cattle that he received would be received on the shrinkage, that's right.

Q. And the weight of those 400 head of cattle which you paid for, those cattle would be accepted by Mr. Butcher, is that correct?

A. That's right.

Q. Now, as a matter of fact, at least 50 head of those cattle were never weighed, were they?

A. All of those cattle were.

Q. Inbound? A. Inbound, yes, sir.

Q. Every single one of those cattle delivered was weighed inbound?

A. All those cattle were weighed.

Q. And how many head of those cattle, Mr. Yost, did Mr. Butcher lose during that feeding period? A. I believe two. [40]

Q. Now, those cattle were taken out of Mr. Butcher's place, were they not?

A. That's right.

Q. By whom? A. By me.

(Testimony of James R. Yost.)

Q. Anybody else? Mr. Stringer, for example?

A. No, no. I took the cattle. I took the cattle back on April the 6th.

Q. And where did you take those cattle?

A. Where did I take the cattle?

Q. Yes.

Q. I took 300 head of those cattle to Sand Hollow to grass and turned them over to Mr. Stringer.

Q. Whose ranch was that?

A. I turned them back to Mr. Stringer at that time.

Q. And what did you do with the others?

A. The others, I bought feed there from a near neighbor and fed them in the yard for possibly ten days.

Q. Where? A. At Butcher's.

Q. And did you also pasture them?

A. I did, yes, sir, for about ten days.

Q. Did you feed them yourself?

A. I did.

Q. You stayed there all during the ten days?

A. I hired a man to feed them.

Q. Who did you hire?

A. A man by the name of Edison, I believe.

Q. And you say his name is Edison?

A. I believe so.

Q. And who did you know him as? Who did you know him as?

A. Who did I know him as?

Q. Yes. You knew him as Mr. Butcher's hired hand, didn't you?

(Testimony of James R. Yost.)

A. I don't believe he was in Butcher's employment at the time. At least, he didn't.

Q. Had you seen him at all during the winter?

A. He had lived in a house on one of Butcher's lower places, but——

Q. Had you seen him feeding those cattle during the winter? A. No, sir, I did not.

Q. You didn't. What kind of a winter was that, Mr. Yost?

A. Oh, I would say it was an average winter.

Mr. Shepard: That's all.

Redirect Examination

Q. (By Mr. Donart): You say that you removed the cattle from the feed lot?

A. Yes, sir. [42]

Q. State whether or not Mr. Butcher was there?

A. Yes, he was.

Q. And why did you remove the cattle?

A. Because he was completely out of feed at the time that I took the cattle back.

Q. All right. And what else?

A. And the cattle at this time were barking the trees in a locust grove and were down in a sand pile eating sand and it was apparent that they weren't going to live very long and they were the roughest looking cattle I had ever seen to come out of a feed yard.

Q. In other words, in what condition were the cattle when you took them off the feed lot?

A. They were very poor. I believe they were the

(Testimony of James R. Yost.)

worst looking cattle that I have ever seen to come out of a feed yard.

Q. In your opinion were those cattle at that time being given proper care and feed?

A. No, sir, they were not.

Q. Did Mr. Butcher make any objection to your taking them off the feed yard at that time?

Mr. Shepard: We object to this conversation unless arrived at in the usual way.

The Court: Lay the foundation for the conversation.

Q. (By Mr. Donart): Well, what conversation did you have with Mr. Butcher when you took the cattle off the feed lot? [43]

A. Well, I went to Mr. Butcher and explained the condition of the cattle, I asked him if he would return them to me. He readily agreed because, he said he was out of money and out of feed.

Q. What? I didn't get your answer.

A. I went to Mr. Butcher and he said that he would turn the cattle over to me because he was out of money to buy more feed and was out of feed.

Q. Was that why you took them back?

A. That is why I took them back.

Q. Now, in connection with this contract that has been admitted in evidence—I think it is Defendants' Exhibit 6—did you solicit Mr. Butcher for a contract of that kind or did Mr. Butcher solicit you?

A. Mr. Butcher approached me to furnish him 600 head of cattle first.

(Testimony of James R. Yost.)

Q. And I believe you explained why it was 400 instead of 600?

A. That's right. He asked me for 600 and then later came back and said that he had decided that he wouldn't have enough feed for 600 and he would like to have four. And the way it turned out, he didn't even have enough feed for those.

Mr. Donart: You may cross examine.

The Court: We will take a recess now.

(Short recess taken.) [44]

Recross Examination

Q. (By Mr. Shepard): Mr. Yost, when you went over to get those cattle at Mr. Butcher's place, where in particular on the ranch were they, on the high part of the ranch or in the lower part?

A. I didn't hear the first part of your question.

Q. When you went to get those cattle from his place, where were those cattle in particular, were they in the pens in the lower part of the place or on the higher part of the place, or what?

A. At Mr. Butcher's place, you mean?

Q. Yes, at the time you went to get them.

A. Well, he had them in two bunches. He had one bunch at the lower end of his place and one bunch on the upper end of his place.

Q. One bunch on the upper. What was the average daily ration that you and Mr. Butcher had agreed on to feed those cattle?

A. Daily ration, you say?

Q. Yes.

(Testimony of James R. Yost.)

A. I believe the contract calls for—just a minute, let's see if we can find what his contract calls for here (examining). The contract calls for 15 pounds of ensilage, two to three pounds of grain, and approximately five pounds of hay or its equivalent for each animal. [45]

Q. In your opinion, was that an adequate and satisfactory ration to feed those cattle through the winter?

A. On that kind of ration, an average animal should gain at least a pound a day, and that would be the minimum feeding, and they could gain a pound and three-quarters per day. Now, these animals that he received were Number One choice top quality feeders, there was no better feeder calves in the country than the calves that he received. These calves that he received from John Stringer were cut off of a bunch of cattle——

Mr. Shepard: Your Honor, I move to strike all of the voluntary statements of the witness.

The Court: Motion granted.

Q. (By Mr. Shepard): Now, the reason that those cattle were taken out of there is because Stringer had good grass up at Sand Hollow and he wanted to put them on the grass, isn't that correct?

A. No, sir.

Q. You left yours there. A. I left mine.

Q. In the pasture to feed?

A. I left mine there and bought feed myself for them, yes, sir.

Q. And pastured them also?

(Testimony of James R. Yost.)

A. And pastured them, yes. [46]

Q. And they did well, didn't they?

A. No, they did not.

Q. Yours did not?

A. No, mine did not.

Mr. Shepard: I think that is all.

Redirect Examination

Q. (By Mr. Donart): Now, you have had experience, I take it, as a stock feeder? A. Yes, sir.

Q. And observing feeding of stock?

A. Yes, sir.

Q. Is the 15 pounds of ensilage, five pounds of hay or its equivalent and the two to three pounds of grain a ration upon which cattle such as these would normally gain? A. Yes, sir, it is.

Q. Were these good cattle?

A. They were extremely good cattle. I would say they were choice feeder cattle.

Q. And what ages were they? That is, were they coming yearlings or what?

A. They were weaners, coming yearlings.

Mr. Donart: I believe that is all.

Mr. Shepard: I think that is all.

The Court: Step down; next witness.

(Witness excused.) [47]

JOHN STRINGER

called as a witness by the plaintiff, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record. A. John Stringer.

Q. What is your occupation, Mr. Stringer?

A. Livestock and farming.

Direct Examination

Q. (By Mr. Donart): Where do you live, Mr. Stringer?

A. Well, I live in Pocatello, Idaho, that is my residence but I spend quite a lot of time at Nyssa, Oregon, in the winter time.

Q. You divide your time between McCall and Nyssa?

A. Yes. The winters at Nyssa, Fall and Winter. I spend about four months at Nyssa. The balance of the time I spend at the other place.

Q. What has been your principal occupation through the last ten years?

A. Well, I run sheep and feed cattle, pasture cattle.

Q. You also raise cattle?

A. Yes, I raise cattle.

Q. You are rather extensively in that business, I take it?

A. Well, I don't know whether you'd call it extensive or [48] not, but I run a reasonable number of livestock.

Q. Just a little louder, Mr. Stringer. Have you been here in the courtroom and heard the testimony

(Testimony of John Stringer.)

up to now in this case? A. Yes, I have.

Q. You are acquainted, I believe, with Mr. Butcher? A. Yes, I am.

Q. How long have you known him?

A. Well, I wouldn't know for sure but I would say 12 or 15 years.

Q. Are you the John Stringer whose cattle, as testified, pertained to the Butcher Feed Lot?

A. I am.

Q. Before those cattle were taken to the feed lot, state whether or not Mr. Butcher came over to your place and had a conversation with you with respect to those cattle. A. I wouldn't—

Q. Just tell whether he did.

A. I wouldn't say whether he came to my place or whether I saw him downtown some place, but we had a conversation about the cattle.

Q. And was that before the cattle were—while they were still on your feed lot?

A. Well, it might have been even before I had these cattle in my feed lot, before I received them. I am pretty [49] sure it was.

Q. You had them on your place?

A. I don't think I had these cattle on my place at the time we talked about it.

Q. All right. Did you have just one conversation or more than one?

A. I think just one, I think.

Q. All right. Tell us the substance of that conversation.

A. Well, there wasn't very much to it. It seemed

(Testimony of John Stringer.)

—there seemed to be a question in his mind as to what kind of——

Mr. Shepard: Object to the question——

The Court: Objection sustained.

Q. (By Mr. Donart): Just tell what he said, what he asked you and so forth.

A. Well, he just told me he understood he was going to get some of my cattle through Jimmy Yost and he wanted a fair weighing condition on it. Now, that's about all we talked about. I think we did talk certain cattle that I had bought that I might give him.

Q. Do you think there was some discussion as to what cattle you might give him?

A. Yes. And I think there was some discussion about some some of these cattle not being dehorned, and he didn't have facilities to do it very well there. I think there was some [50] discussion about using cattle that were dehorned.

Q. And which did you give him, dehorned cattle or cattle with the horns on?

A. I gave him all——

Mr. Shepard : Object to that, if your Honor please. There has been no testimony, no evidence that Mr. Stringer gave Mr. Butcher any cattle.

Mr. Donart: Well, which cattle were taken from your place, dehorned cattle or cattle with the horns on, taken from your place to Butcher's?

A. Well, they were all dehorned cattle.

Mr. Shepard: We will object to this unless some

(Testimony of John Stringer.)

foundation is laid to show Mr. Stringer knows where those cattle went to.

The Court: Come, come, counsel, we haven't got a jury here. The objection is overruled.

Mr. Donart: You may cross-examine.

One other question, pardon me.

Q. You heard the testimony of the ration that was supposed to be given, fed to those cattle, 15 pounds of ensilage, five pounds of hay, and two to three pounds of grain, you heard that testimony?

A. Yes, I did.

Q. State whether or not in your experience as a feeder that is a ration upon which cattle, such as you furnished at [51] that time, would normally gain weight?

A. Well, I would say that I feed my cattle a little bit more than that. I would say that they should gain at least a pound a day.

Q. All right. Did you see those cattle—did you go over to the Butcher Feed Lot and see those cattle just before they were removed by Mr. Yost?

A. I saw those cattle about the 1st of April. That's when I first saw them.

Q. In what condition were they about the 1st of April? A. Well, it wasn't very good.

Q. Well, just describe it.

A. They looked to me like they barely made it through the winter. They were not in good condition at all. They were not dying but they were quite thin.

Q. Did they look to you like they were as heavy

(Testimony of John Stringer.)

as they were when you delivered them in the fall before? A. I didn't think so.

Mr. Shepard: I am going to object——

A. I didn't think so.

The Court: Overruled.

Mr. Donart: You may cross-examine.

Cross Examination

Q. (By Mr. Shepard): Mr. Stringer, the rations that cattle would need to [52] gain weight or even stay healthy, would be determined in large part by the weather over a winter, wouldn't it?

A. By the what?

Q. Would be determined in large part by the weather over the winter, wouldn't it?

A. Oh, I wouldn't say so. The cattle will eat a little more in bad, cold weather, but I wouldn't say that would have too much to do with it. It takes so much to feed, so much feed to feed an animal and make him gain or even keep him alive.

Q. In other words, if it were a mild winter, with the temperature getting to, say, below 20 to 25 above, cattle would not require any more or any less in temperatures like that than they would in 10 to 20 below, is that correct?

A. I would say that cattle would require a little more feed in cold weather but they would probably do just as well.

Q. And—— A. Probably better.

Q. You were in California the largest part of that winter, were you not? A. Yes, I was.

(Testimony of John Stringer.)

Q. So you don't know what the weather was like other than what somebody might have told you?

A. Well, I have some idea what the weather was like. I don't just go away and completely ignore what I am doing. [53]

Q. How is the grass coming on at your Sand Hollow ranch the first part of April?

A. Well, I would say it wasn't very good. It's never very good the first part of April.

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused.)

The Court: Next witness.

Mr. Donart: Plaintiff rests.

The Court: Proceed.

Mr. Shepard: If your Honor please, at this time the defendant Morrow moves for a dismissal of the action as to her on the basis that plaintiff's own evidence on direct and cross-examination has shown there is no consideration involved whatsoever as to the said defendant Morrow, and further, on the theory that if she is considered by the Court to be an accommodation maker on said instrument, that the security has been dissipated, and there has been no showing that she has made any consent to that dissipation.

The Court: I will reserve ruling on that until the completion of the case in accordance with the rule.

Call your witnesses.

Mr. Shepard: Call Mr. Clayton Butcher.

CLAYTON A. BUTCHER

one of the defendants herein, called as a witness in his own [54] behalf, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name and occupation for the record.

A. Clayton Butcher, I am a farmer.

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mr. Butcher? A. Over at Parma, Idaho.

Q. You operate a ranch over there?

A. I do.

Q. How many acres do you operate?

A. Around 240.

Q. You are one of the defendants in this action?

A. Beg your pardon?

Q. You are one of the defendants in this action?

A. I am.

Q. You heard the testimony regarding the—the preliminary testimony regarding the note and the mortgage in this case? A. I have.

Q. And you executed that note and mortgage, you signed it? A. I did.

Q. Will you state the circumstances leading up to the execution of that note and mortgage and contract, Mr. Butcher?

A. Well, it was in July that Mr. Yost drove out to my place. I was irrigating corn, and he asked me what I was going [55-56] to do with all of my feed. And I told him I was going to sell it, that was the reason for it, what I was raising it for, and I had

(Testimony of Clayton A. Butcher.)

a note to meet that fall at the bank, that I had to pay on.

Well, he said he could get the money to buy 1,000 head of cattle with. He wanted to put them out on feed.

And I told him well, I couldn't feed no such number of cattle.

He said, "Could you feed 600?"

And I said, "No, I could feed around three to four hundred."

And so we just kept talking, and so he came out another time and wanted to know if I knew of anybody else that would be interested in that kind of a deal that he could put these cattle out on.

I said, "There's a fellow down at Parma, Mr. Dola." And so we went down to see him and——

Mr. Donart: Now, just a minute. That is objected to as being immaterial.

The Court: Overrule the objection.

Q. (By Mr. Shepard): Go ahead.

A. And he said that Mr. Dolan—. He thought it over and called me a time or two and he told me to tell Mr. Yost he wasn't interested in it, that he didn't, he figured, had enough—that he had feed enough that he wanted to bother with [57] the calves.

So then when Jim kept coming out and talking to me, I told him that I would have to have some money to pay the bank off before—so I wouldn't have to sell that feed—if I fed any cattle. He said he would fix that, he would get money for it, which

(Testimony of Clayton A. Butcher.)

he did. He gave me \$800 there to bind the deal, and at the time there was nothing said about any note or mortgage or anything. He said he would have his attorney fix up the contract, and he had done that.

Q. (By Mr. Shepard): That was the contract which you signed on July 15? A. Yes.

Q. And you stated nothing was said at that time about a note or mortgage?

A. No, there wasn't.

Q. Will you state what happened after you signed the contract, when did this note and mortgage come up?

A. Well, it came up later. He put in a few head of cattle of his, that he trucked in there, and I told him, I said, "My mortgage note is getting due at the bank and I am going to have—you're going to have to dig that money up, I have got to pay them."

Well, he said he would do it, and he come back in a day or two and told me, he said, "I have got to have a note and mortgage from you before I can get the money to pay you." [58]

And I said, "Why is that? I have got the feed there. You have got your security. Why do you want that?"

Well, he said, "I have got—just got to have it, I have got to have your mother-in-law sign it."

I said, "Why does she have to sign it?"

Well, he said, "She owns the land. She might run us off of here or something".

(Testimony of Clayton A. Butcher.)

Q. Now, regarding that feed, was that on the property at the time?

A. Well, a lot of it, the biggest part, all but some hay and some extra feed I bought later on in the year.

Q. State what Mr. Yost did, if anything, respecting that feed.

A. Well, he just looked at it. He said I had a lot of nice feed. He said, "You have got a lot of nice grain and corn and stuff," to that effect.

Q. How many times did he inspect that feed?

A. I don't know. He was over there pretty nearly every day for a while.

Q. And did you——

Mr. Bailiff, would you give the witness Exhibit No. 2, please.

Q. Mr. Butcher, on the first page of that mortgage, I call your attention to the amounts of ensilage, corn, grain, straw and hay. [59]

Now, did you furnish those figures to Mr. Henigson, the lawyer? A. Where's that at?

Q. On the first page.

May I point out to the witness, your Honor, to save time?

The Court: Yes.

Q. (By Mr. Shepard): Right here. Did you furnish those figures?

A. No, I did not. He took them figures all down himself.

Q. Who is "he"?

(Testimony of Clayton A. Butcher.)

A. Jim Yost did. I never seen them figures until I signed the mortgage.

Q. Had you ever talked to Mr. Henigson before you signed that mortgage?

A. No, I never had.

Q. Do you know who he was?

A. No, I didn't even know his office. I had never been in it.

Q. You never used him as a lawyer?

A. I had heard that he was an attorney, yes.

Q. Mr. Butcher, if you had not had the feeding contract with Mr. Yost, would you have signed that note and mortgage?

A. No, I would not. But I didn't know what I was going to [60] do.

Q. Now, who gave you that money?

A. Mr. Yost.

Q. And how much did he give you?

A. He give me two checks, one for \$800 and one for \$6500.

Q. When did he give you the \$800 check?

A. That was along in the summer when we talked the deal up.

Q. Was any part of that money supposed to go to Mrs. Morrow? A. No.

Q. Did she have any ownership of that feed of yours? A. Not a bit.

Q. That was all yours?

A. That was mine, yes.

Q. Did you have any ownership of any of her cattle or any of her feed on her ranch?

(Testimony of Clayton A. Butcher.)

A. No.

Q. No, she does own the land that you are operating that acreage under? A. That's right.

Q. Was she any party in any way to any feeding agreement that you had with Mr. Yost?

A. None whatever, that I know of.

Q. Will you state whether or not there had been any conversation with Mr. Yost relative to where those cattle were [61] to come from?

A. When he come out at the time we made the deal, he told me he was going to buy these cattle in Jordan Valley and these cattle would be hauled from Nyssa and weighed off trucks and brought out there, and that was the agreement he and I made up.

Then something turned up, he couldn't get the cattle or something, I don't know what happened, but that's when I started into the agreement with him—that was my idea, where the cattle was to come from, and that's what he said, where they were to come from.

Q. Now, state if you had any agreement with Mr. Yost relative to who was to own those 400 head of cattle.

Mr. Donart: Now, I make the same objection, that is calling for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Shepard): Were 400 head of cattle delivered to your place at Parma, Mr. Butcher?

A. Well, I had 397.

Q. Speak up, because we can't hear you.

A. I think there was 397, to be exact.

(Testimony of Clayton A. Butcher.)

Q. And what kind of shape were those—Strike that.

I will ask this question: Do you know where those 397 head of cattle came from?

A. No, I don't. [62]

Q. Will you state what kind of shape those cattle were in when they arrived at your place?

A. Well, 300 of them was in good shape, and the other 97, I wouldn't say that they were.

Q. Will you state what was the condition of the cattle as far as weight is concerned, whether they were—when they arrived at your place?

A. 300 of them were just as full as any cattle could get.

Q. How long have you been in the cattle business, Mr. Butcher?

A. Well, I've been in 10 or 15 years.

Q. And does that embrace feeding cattle as well as raising cattle? A. Beg pardon?

Q. Has that experience of yours been in the business of feeding cattle as well as in running cattle on the range?

A. Well, some, yes, I have done a bit.

Q. In your opinion, is it possible to stuff cattle to the point where they will be 30, 40, 50 pounds more than they ordinarily weigh?

Mr. Donart: Now, just a minute. That is objected to as being entirely outside the issues in this case. They haven't charged that these cattle were stuffed and not brought there in the shape they should have been in.

(Testimony of Clayton A. Butcher.)

The Court: Objection sustained. [63]

Q. (By Mr. Shepard): Did you have a conversation with Mr. Yost after the cattle had arrived there regarding their condition?

A. I asked him where he stopped at the filling station.

The Court: I didn't hear that.

A. I asked him where he stopped at the filling station.

Q. (By Mr. Shepard): What did he say?

A. He said, "They had been fed this morning all right." He said——

Q. Did he state where they had been fed?

A. No, he just said, "They had been fed." That is what he said.

Q. Did you refuse to accept those cattle?

A. No, I didn't.

Q. Did you weigh those cattle inbound, Mr. Butcher?

A. No, I never weighed them.

Q. Were you ever furnished any bill of lading—bill of sale showing any weights on it?

A. No.

Q. Were you ever furnished any scale tickets of any certifying or bonding weigher?

A. No, I wasn't.

Q. Did you ever request Mr. Yost to show you any scale weights or any bill of sale showing the weights?

A. Yes. [64]

Q. What did he say?

A. He said, "I have the figures all here. I forgot and left the ticket at home."

(Testimony of Clayton A. Butcher.)

Q. Did he ever bring those to you?

A. No, I never seen them.

Q. Whose brand was on these 300 head of cattle that came in?

A. Well, evidently Mr. Stringer's.

Q. Did you know that they were Mr. Stringer's—that that was Mr. Stringer's brand at that time?

A. No, I didn't.

Q. Did you know that that was not Mr. Yost's brand at that time? A. Yes.

Q. Did you have any conversation with Mr. Yost as to the brand on those cattle?

A. Other than I asked him when we was going to brand them.

Q. When you were going to brand them—What do you mean by that?

A. When we was going to brand them, the other 300; that we already had about a hundred of them in there, 80 or 90 of them, that I had done, something like that, that he had come and we had branded all of them, and I had asked him when we was going to brand these 300. [65]

Q. What did you brand those first 97 with, what type of brand?

A. Tomahawk on the left side.

Q. And you asked him when you were going to brand the remaining 300 head? A. Yes.

Q. What did he say?

A. Oh, he said, "Well, in a few days".

Q. And were those cattle ever re-branded?

A. No.

(Testimony of Clayton A. Butcher.)

Q. Now, approximately how much feed did you have on hand when those cattle arrived?

A. Well, I had around better than 500 ton of ensilage, between five and six hundred ton, and I had 92 or 4 ton of grain, and I had 46 ton of hay and about 35 or about 30 ton of straw.

Q. And did you have any ear corn?

A. Yes. Well, that was grain—I counted mixed grain and corn, it was corn and wheat and barley.

Q. Did Mr. Yost ever inspect that hay?

A. I showed him in the granary. He looked in the granary a time or two.

Q. Did he ever inspect the ensilage pits?

A. Well, I don't know. He was standing right there, he looked right across and seen them many a time. [66]

Q. During the time that that Mr. Yost was inspecting the grain did you have any conversation with him regarding how many cattle that feed would take care of for a winter? A. No.

Mr. Donart: Again that is objected to as being no charge that he was misled by Mr. Yost in that respect.

The Court: Do you wish to be heard on this, Mr. Shepard?

Mr. Shepard: If your Honor please, the plaintiff in their Answer to the Cross-Complaint have set forth that Mr. Butcher did not have sufficient feed at that time.

The Court: All right, I will allow the question. You may answer that.

(Testimony of Clayton A. Butcher.)

A. Well, what was that, how was that? What was the question? What was that about Mr. Yost?

Q. (By Mr. Shepard): Did you have a conversation with him regarding how many cattle that feed would care for?

A. Yes, we figured it would care for——

Q. What did he say?

A. He said it would take care of 400 or 500, he thought.

Q. Do you have an opinion as to what ensilage was worth during that winter?

A. It was worth \$8 a ton.

Q. Do you have an opinion as to what ear corn and grain was worth that winter? [67]

A. Mixed grain ground and laid in was around 50 to \$52, and corn was about \$45 ground.

Q. And how about straw, what was that worth?

A. Straw was worth \$10, 10 to 12.

Q. How much was hay worth?

A. Hay was worth \$25 all over the valley.

Q. And did hay go a good deal higher that winter than 25?

A. It went, towards spring it went up toward 28 and 9, along in there.

Q. Did you feed and take care of those cattle during the winter? A. Beg pardon?

Q. Did you feed and care for those cattle during the winter?

A. Well, I did the best I could, yes.

Q. What type of weather was it that particular winter?

(Testimony of Clayton A. Butcher.)

A. Well, it rained and then it snowed, blowed and then it would freeze up and then it would warm up and get muddy. An awfully bad winter.

Q. How long have you been wintering—I mean, how long have you been ranching in that particular area? A. I have been there eight years.

Q. And how did that particular winter compare with the other seven that you have been there, as far as feeding cattle [68] are concerned?

A. Well, I believe it was the worst.

Q. Now, speak up, because we can't hear you.

A. I said I believe it was the worst, it was an awfully tough winter.

Q. And what effect did that continued raining and freezing up have on the cattle?

A. Well, it had quite an effect. We had a lot of sick ones. I know that they got sore footed, and I had 60, 70 of them in the—bunched up under a shed practically nearly all winter.

Q. Will you state what, if you know, cattle feeding conditions were generally all through that area that you were in, that winter?

A. It wasn't good, it was a pretty tough winter.

Q. Was there a considerable amount of cattle sickness that winter, through that area, all through that area? A. Yes. What I heard there was.

Q. What would you estimate to be the average death rate per hundred head of cattle that particular winter, for calves that were on feed, all through that area?

(Testimony of Clayton A. Butcher.)

A. I don't know, I imagine two or three per cent.

Q. Two or three per cent? A. Yes.

Q. Now, you stated that those cattle were sick during the [69] winter. Was that because of the weather? A. It was.

Q. Did you doctor those cattle during the winter? A. Yes, I did.

Q. How many cattle did you actually lose out of that whole bunch? A. One.

Q. One? A. Yes.

Q. Did Mr. Yost come out and inspect those cattle? A. He was there.

Q. During the course of that winter?

A. Sometimes he was there every week, I'm sure, and sometimes he was there two or three times a week.

Q. During the time that he came out and inspected those cattle during the winter did you have any conversation with him regarding their condition? A. Yes.

Q. Will you state what those were?

A. I would say, "Jim, how are they doing?"

"By golly, they're looking fine," he would say, "really doing good."

Q. To your knowledge, did John Stringer ever inspect those cattle?

A. Not till about four or five days before they took them [70] out.

Q. During the month of March, 1956, did you

(Testimony of Clayton A. Butcher.)

have any conversation with Mr. Yost regarding the condition of those cattle?

A. Yes, I had one just a few days before they took the cattle out.

Q. And what did he say about those cattle, if anything?

A. I asked him how he thought they were doing. He said, well, he thought they was doing as good as anybody's cattle was doing.

Q. Did Mr. Stringer or Mr. Yost or anyone come to you during the winter and complain about the condition of those cattle?

A. Not one word that I ever remember of. I know they didn't.

Q. Approximately what daily ration did you feed those cattle during that winter?

A. Well, during that worst bad weather there I was feeding them up around 20, 25 pounds of ensilage and about 10 pounds of hay and 4 or 5 pounds of grain.

Q. Per day? A. Yes.

Q. Will you state whether or not in your opinion the weather makes a difference in how much you have to feed cattle to keep them healthy? [71]

A. It makes a lot of difference.

Q. Will you state why?

A. Them cattle will stand around in that cold mud and rain blowing on them and it takes a lot more feed to keep that heat in their system.

Q. So you did feed them more than the actual ration called for under the contract?

(Testimony of Clayton A. Butcher.)

A. That's right.

Q. Did you ever feed them any less than the rations called for in the contract? A. No.

Q. On or about April 6, 1956, what happened to the cattle that you were feeding?

A. Jim Yost and John Stringer came out and said these cattle didn't look like they was doing any good and they was going to take them.

Q. What was that?

A. I said Yost and Stringer came out and said they thought they would take the cattle, the grass was good enough over at Sand Hollow, that they could turn them out there.

Q. Did you in any way consent to them taking those cattle?

Mr. Donart: Well, now, just a minute, that is asking the witness' conclusion of his own mental reaction.

The Court: Change the form of the question then I will allow it. [72]

Q. (By Mr. Shepard): What, if anything, did you tell Mr. Stringer and Mr. Yost when they came out there about taking those cattle?

A. I said—I told them that—I said, "The weather is good now, the cattle are doing fine, I hate to lose them now."

Q. What did they say to that?

A. Well, they said it didn't look like they were doing any good and the grass was good over at Sand Hollow and they would turn them out.

(Testimony of Clayton A. Butcher.)

Q. Did they at that time inspect the feed that you had left on hand?

A. I don't know if they ever got out of the car. They just drove out there and looked.

Q. Did they ask you how much feed you had left at that time?

A. No, they did not, sir. They just said the cattle wasn't doing any good and they were going to take them. That was it.

Q. Did they ask you what the status of your financial condition was at that time?

A. Not a word.

Q. Did they ask you whether you could afford to buy any more feed? A. No.

Q. As a matter of fact, had you purchased a substantial [73] amount of feed, in addition to that shown in the mortgage, during the course of that winter?

A. Yes, I had purchased a lot more.

Q. Would you state approximately how much more of each type of feed you purchased during that winter?

A. I bought 123 ton of ensilage and I bought 50 or so ton of hay and I bought 12-15 ton more of grain.

Q. That was in addition to what you had on hand at the beginning of the season?

A. That's right.

Q. Did you have further feed on hand at the time they took those cattle out?

A. I didn't hear you. It wasn't right on hand.

(Testimony of Clayton A. Butcher.)

I had the feed bargained for and I was hauling it every morning and feeding the cattle.

Q. And where were you hauling it from?

A. I was hauling it from Mr. Fritz, my neighbor right next to me.

Q. And had you purchased hay from him?

A. Yes.

Q. And will you state how much per ton you bought that hay for? A. \$25.

Q. And regarding that hay owned by Mr. Fritz, will you state what, if anything, Mr. Yost asked you to do regarding [74] that hay after he brought his 100 head back or his 97?

A. He wanted to know if I could get him some hay, and I told him I didn't. The deal I had with Fritz, I was to use all his hay that I needed, and when I got through feeding he wanted the hay. The hay was hard to get. He said he would like to have a little left over. If I didn't need it, to leave it right there. So I didn't get no hay for anybody else.

Q. Did you take any other cattle for feeding following the Stringer and Yost cattle feeding?

A. I did, later in the season, yes.

Q. Whose did you take?

A. I took Pat Parker.

Q. Pardon? A. Pat Parker.

Q. And were those calves or were those heavy cattle? A. They was about half and half.

Q. And how many head were those?

A. Around 60.

(Testimony of Clayton A. Butcher.)

Q. 60 head? A. Yes.

Q. Did he furnish the feed to feed those with?

A. Yes.

Q. Mr. Parker did? A. Part of it. [75]

Q. Who furnished the other part?

A. I did.

Q. Did Mr. Yost or Mr. Stringer or anyone ever furnish you with any outbound weights?

A. No.

Q. As shown by scale tickets? A. No.

Q. Did Mr. Yost—did you ever ask Mr. Yost for those weights of the cattle?

A. I did. I asked him where the scale tickets was. He said, "I've got it. Here's the deal, right here, I have got it all right here on the paper."

Q. Now, speak up. Speak up.

Mr. Donart: I couldn't get that answer at all.

(Answer read back by reporter.)

Q. (By Mr. Shepard): Did he ever actually show you those scale tickets?

A. No. No, I never seen it.

Q. What did he show you?

A. He showed me some figures that he had added up there on a piece of paper.

Q. Has he or Mr. Stringer ever given you either the inbound weights or the outbound weights of those cattle on scale tickets?

A. No, not on scale tickets. [76]

Q. Did you ever agree with Mr. Yost as to the amount which was due you for feeding those cattle?

(Testimony of Clayton A. Butcher.)

A. No, I never agreed with him because I didn't know for sure.

Q. If you had known those 300 head of cattle were owned by Mr. Stringer instead of by Mr. Yost, would you have entered into that contract and signed that note and mortgage?

A. No, no, I wouldn't have.

Q. Why not?

A. Because I just wouldn't have done it.

Q. Speak up.

A. I said, no, I wouldn't have done it, because I——

The Court: He asked you why.

A. Why?

Q. (By Mr. Shepard): Yes.

A. Just because I never had any dealings with Mr. Stringer and I didn't want none.

Q. Now, what happened to the 97 head of Mr. Yost's cattle after he took them out?

A. He come and told me he wanted to know if he could bring them back to my place and use my yard. He said he could buy some hay, he thought, and feed them a few days. He had some place where he wanted to go with them, where I don't know. And I said, "Well, I guess you can."

So he said, "I will take them and have them weighed [77] and bring them back."

Q. Were those 97 head fed and pastured, both?

A. Yes, I think for a few days.

Q. How much work did these cattle require dur-

(Testimony of Clayton A. Butcher.)

ing the winter, was it an hour or so a day, or a full time job, or what?

A. It was a full time job, I know, for me.

Q. Approximately how many hours a day did you put in?

A. Well, I started in at daylight and worked way up to dark.

Q. And approximately how many days a week did you work in that fashion, four or five days a week? A. Seven.

Q. Was that again because the weather was so bad during that part of the winter?

A. What was that?

Q. Was that because the weather was bad, that they required more care as well as more feed?

A. Yes, because I had a lot of sick ones to doctor.

Mr. Donart: If it will shorten this, we will stipulate feeding that many cattle was a full time job for one man under any weather conditions.

Q. (By Mr. Shepard): What was the value of your labor per hour, would you estimate, Mr. Butcher?

A. Well, I imagine a dollar an hour is what they was getting. [78]

Q. Were you the only person who was working on these cattle?

A. No, I had extra help at different times.

Q. And what did you pay them, if anything?

A. I paid them a dollar an hour when they helped me.

(Testimony of Clayton A. Butcher.)

Q. And how much did you pay them altogether?

A. Between—right at \$500.

Q. Did your two sons work with you?

A. On weekends they would help me grind feed and haul in hay to help through the week so I could get it in.

Q. Did you have to use any equipment?

A. Yes. I used tractors and trucks.

Q. And how many of each?

A. Well, I had three tractors there and two—one truck all the time and then I had another truck part time because I would get stuck so that I would have to have two trucks to get along.

Q. Would the reasonable rental of the tractor and loader be \$1.50 an hour? A. Yes.

Q. And would the reasonable rental value of those trucks be at least \$1 an hour?

A. Why, I think so. I don't think you could get one any cheaper than a dollar an hour.

Q. How many acres of land did you use for that feeding [79] program?

A. I used 200. Right at it. I had two hundred and some acres and the house and stuff out there, but it was around 200.

Q. What was the reasonable rental value of that land for that period of time?

Mr. Donart: Just a minute. That is objected to unless he shows for what purpose.

Mr. Shepard: For the purpose of feeding cattle.

The Court: With that amendment the question will be allowed.

(Testimony of Clayton A. Butcher.)

A. Well, what is that?

Q. (By Mr. Shepard): What was the reasonable rental value of that land for that period of time for feeding purposes?

A. Well, I would say—I don't know——

The Court: Speak up, speak up.

A. I imagine around three cents a day per head.

The Court: Three cents per day per head?

A. Yes. I don't think that would be out of line.

Mr. Shepard: That is all.

Cross Examination

Q. (By Mr. Donart): Now, on this feeding on the land, what ground did they feed on, was it agricultural land or what was it? [80]

A. What was that?

Q. What kind of ground were these stock fed upon, was it agricultural ground or what kind of ground?

A. Well, some of it was agricultural, and some was sandy and some was hilly.

Q. As a matter of fact, a landowner would generally be glad to have livestock fed on his land, wouldn't he, for the benefit the land get out of it?

A. Were you asking me that question?

Q. Yes, sir.

A. Well, they would if it wasn't wet and they trampled your alfalfa and stuff on the ground.

Q. Did you feed on the alfalfa?

A. I fed on it lots of times, yes.

Q. As regards this 460 tons of ensilage, 39 tons

(Testimony of Clayton A. Butcher.)

of corn, 30 tons of grain, 40 tons of straw and 90 tons of hay, was that all consumed in feeding these cattle? A. Yes.

Q. No part of it left then?

A. No. There might be 30 or 40 ton of ensilage left in the pit. There was some ensilage left in one pit. Whatever there was, it's still there.

Q. How's that?

A. I said there was a little ensilage left in one pit, and whatever there was is still left there, I never took it out. [81]

Q. There might be some ensilage left in that pit?

A. But there is not very much, 30, 40 ton, that would be the top of it.

Q. After being there this long would it have any value? A. No, it wouldn't.

Q. How's that?

A. It would be plumb rotten.

Q. Would it have any value? A. No.

Q. So if there is any of the mortgage chattels left, mortgage crop left, it, it has no value, is that right? A. That would be right.

Q. Now, you said you leased some land from Mrs. Morrow. Is that in addition to some land you own yourself?

A. I never said I leased any from Mrs. Morrow.

Q. Now, you said something, some of this land belongs to Mrs. Morrow. A. Yes.

Q. Is that correct? A. That's right.

(Testimony of Clayton A. Butcher.)

Q. Is that in addition to the 240 acres that I understood you to say that you own?

A. I never said I own any. I just run 240 acres.

Q. Oh. And whose land were you running?

A. I was running Mrs. Morrow's and Bob Caruthers. [82]

Q. Yes. Then was this mortgaged crop, 460 tons of ensilage, 39 of corn, and so forth, was that raised on Mrs. Morrow's land?

A. Some of it.

Q. How much of it?

A. I don't know.

Q. Can you give us an estimate of what portion of it?

A. Well, all the grain and the corn was.

Q. Any of the hay?

A. Yes, and the hay.

Q. The hay. How about the ensilage?

A. Well, the ensilage, some come off there and some the other place.

Q. In the Caruthers' place?

A. Down on the river, Caruthers' place.

Q. Would you estimate how much?

A. Well, there was—I cut two days on the Morrow land and we cut 46 loads of ensilage.

Q. 46 loads. And what did the average load weight?

A. We figured around four ton.

Q. Then there would be nearly 200 tons of the ensilage raised on the Morrow ranch?

A. Yes.

Q. What was your arrangement with Mrs. Morrow? Under what arrangement were you operating that ranch? [83]

(Testimony of Clayton A. Butcher.)

A. She is my mother-in-law and she bought the ranch, and my wife and I just run it. She lets us have what we can get off it. [84]

Q. She just gave you what you can get off it?

A. That's right. We pay the taxes and she just lets us have what we make off the ranch.

Q. Now, you were talking about the fact that you were not out of feed, not out of money. Isn't that a fact that later in the month of March 1956 you went to Mr. Yost and tried to borrow \$750 for the purpose of buying more feed—you went to his place in Nyssa?

A. I asked him if I could—That is, I don't know whether it's \$700, I think it was \$200 that I needed. I said until I could get around to make arrangements with my mother-in-law to get some more money. And he wouldn't let me have it. He said he didn't have it. I remember something to that effect. It was no \$750. And I had to make a payment on some ensilage and I needed a little extra money and I asked him if he could let me have it for a few days and he said no.

Q. Now, isn't it a fact, Mr. Butcher, Mr. Yost after these cattle were removed went to your house with the scale ticket and you and Mr. Yost figured out the weight that they weighed and the weight they weighed out at?

A. No. He brought some — He didn't have no scale ticket, the weighed-in weight at all. I never did see them tickets. And where they are at I don't know. He had some figures there that he brought

(Testimony of Clayton A. Butcher.)

out and he said, "Here's the deal, right here."

Q. Do you want to tell the Court that you entered into a [85] contract of this magnitude where the profit, if any, that you would make off the deal depended upon what the cattle weighed when they were brought to your place and you never did ascertain what those weights were?

A. I asked him. He showed me but it wasn't the scale ticket. It was his own figures.

Q. But you never did ascertain what those weights were?

A. I did. I asked him what it was. He said, "Here they are, I copied them off and they are right here."

Q. He told you those were the weights and he had copied them off? A. Yes.

Q. Did you at that time dispute those weights?

A. Yes. I said, "Where's the scale ticket"?

He said, "Well, I've got them down there. I just forgot to bring them out."

I said that I would like to see them.

Q. All right. Did you ever go and follow that up and demand the right to see those scale tickets?

A. No, I didn't.

Mr. Shepard: I am going to object to that line of testimony if your Honor please as to whether he followed it up and demanded. He already stated that he requested.

The Witness: I already demanded.

The Court: Overruled. [86]

Q. (By Mr. Donart): Now, these 300 head of

(Testimony of Clayton A. Butcher.)

cattle from John Stringer, those were good cattle, weren't they? A. Yes.

Q. And they didn't eat any more hay because they belonged to John Stringer than they would have eaten if they belonged to Yost, did they?

A. Yes.

Q. They did? A. Yes.

Q. Because of Stringer's ownership, they eat more than they would if they had been Yost's cattle? A. No, it was the size of them.

Q. Well, you didn't object to the size of them when they were brought there to the place, did you?

A. Object to them? I would have if I hadn't been in that deal or had that note and contract signed, I would have objected to that. I would have put them on the trucks and sent them back on home.

Q. And did you make any objection to the size of those cattle when they were brought there to the place? A. No, I didn't.

Q. And if you had an objection, you would have had the same objection whether they belonged to John Stringer or whether they belonged to Yost, wouldn't you?

A. Well, if they had belonged to Yost I don't think they [87] would have been as full, that would have been the only thing.

Q. Well, wouldn't the size of them have been just as objectionable if they had been Yost's steers as if they had been Stringer's?

(Testimony of Clayton A. Butcher.)

A. I don't get it. I didn't hear part of that.

Q. You said you objected to the size of the steers?

A. I didn't say the size. I said the fullness of them. That is what I meant.

Q. Oh, the fullness of them. Well, they gave you 3 per cent shrinkage on them, didn't they?

A. They said they did. I don't know.

Q. Well, at that time wouldn't they have been just as full if they had belonged to Yost as if they had belonged to Stringer?

A. They wouldn't have if he had brought them out of Jordan Valley and weighed them at Nyssa like our agreement called for.

Mr. Donart: I move to strike that last answer as not responsive.

The Court: The motion is granted.

Mr. Donart: That is all, sir.

The Court: We will take a recess now until half past 1:00.

Mr. Shepard: If your Honor please, may I ask just one question and then I will close my redirect.

The Court: All right.

Redirect Examination

Q. (By Mr. Shepard): Did you ever have to replant any crops that were damaged by those cows? A. Did I what?

Q. Did you ever have to replant any crops that were trampled by those cattle?

A. Yes, some alfalfa.

(Testimony of Clayton A. Butcher.)

Mr. Donart: That is objected to as not material, not within the issues.

The Court: Overruled.

Mr. Shepard: That is all. [89]

Afternoon Session, 1:30 O'Clock P.M.

Mr. Shepard: If the Court please, request permission to recall Mr. Butcher for just a moment?

Redirect Examination—(Resumed)

Q. (By Mr. Shepard): You are the same Mr. Butcher who was sworn and testified?

A. I am.

Q. Mr. Butcher, were any cattle owned by Mr. Caruthers on your ranch during the same period of time that you were feeding the 400 belonging to Yost? A. There was.

Q. How many cattle? A. Fifty.

Q. Whom do they belong to?

A. They belong to Bob Caruthers.

Q. And were those cattle intermixed with the cattle belonging to Yost and Stringer?

A. No, they never was. I had them in a lot by themselves and they stayed there all winter.

Q. Speak up.

A. They were in a lot by themselves and they were never mixed up.

Q. There was a fence separating them? [90]

A. They were two-year-old steers and they were kept separate at all times.

Q. Was any of the feed covered by this mortgage fed to those steers of Caruthers?

A. No, not a bit.

(Testimony of Clayton A. Butcher.)

Mr. Shepard: Would you have these marked for identification, please?

(Whereupon checks were marked Defendant's Exhibit No. 7 for Identification.)

Mr. Shepard: Mr. Butcher, you stated in your prior testimony that you had purchased a substantial amount of feed, in addition to that already shown in the mortgage. The Bailiff has handed you what has been marked as Exhibit for Identification No. 7. Will you please state what that exhibit consists of?

A. These were cancelled checks that I bought extra feed to feed Jim Yost's cattle above what I had on hand.

Q. Those checks represent the amounts of money that you expended in purchasing feed in addition to that shown in the mortgage, is that correct?

A. That's correct. Some of them—There are some of them I haven't got.

Q. This only represents a part of it?

A. Only part of it.

Mr. Shepard: I move its admission into evidence. [91]

The Court: Very well.

Mr. Shepard: May we see the checks?

The Court: What do they total, Mr. Shepard?

Q. (By Mr. Shepard): Do you know what they total?

A. No, I never totaled them. I just sorted them out, the ones I paid for feed with.

(Testimony of Clayton A. Butcher.)

The Court: Do I understand your testimony, sir, you mean that this additional money that you spent was for the feeding of Yost's cattle?

A. Yes.

The Court: It was exclusively devoted to that?

A. Yes.

Q. (By Mr. Shepard): None of the money shown expended by these checks was used to feed or was used to purchase feed for the Caruthers' cattle?

A. Caruthers bought all of his own feed. I didn't have nothing to do with it other than to feed the cattle his feed.

Q. He bought all his own feed?

A. He bought all his own.

Mr. Donart: There is no objection to their admission.

The Court: All right. They may be received in evidence. But at some point here later in the afternoon I would like to have a total of those checks.

(Whereupon, Defendant's Exhibit No. 7 for Identification was received in evidence.) [92]

Q. (By Mr. Shepard): Mr. Butcher, if those cattle of Yost and Stringer had been permitted to remain in your place to the balance of the 150 days, would you have been able to put on substantial gains as far as weight was concerned?

A. Yes, I would have, because the weather was good then.

(Testimony of Clayton A. Butcher.)

Q. What do you mean the weather was good then?

A. Spring had broken, the weather was warm, the cattle was doing good. They would have put on more gain than any other time of the year is what I would say.

Mr. Shepard: That is all.

Mr. Donart: May I see those checks for the purpose of cross-examination?

The Court: Yes.

Recross Examination

Q. (By Mr. Donart): I noticed in these checks there is one dated January 30, 1956, \$25 to Raymond Norlien—it is marked for corn? A. Yes.

Q. You started buying corn at that time?

A. When was that?

Q. January 30th.

A. I gave him a payment on some. I had already spoken for corn. He asked me to let him have a little money and I did.

Q. When was that corn delivered to you? [93]

A. I don't know. I ground it at different times of the year whenever I needed it.

Q. How is that?

A. I said I ground it. It was ear corn and I ground it whenever I needed it, whenever I had time, on Saturday or Sunday when I had my boys help me, we would go grind it—Some of the different places where I bought it.

Q. And I noticed one check for \$50, February

(Testimony of Clayton A. Butcher.)

16, to Raymond Norlien for corn? A. Yes.

Q. Is that when corn was delivered?

A. No, that's just when I give him some money on it. Once in a while I would go up and get some corn and grind it, when I would have time, and whatever it weighed out I paid him for it.

Q. And who was D. R. Hartley?

A. He was a man over in Oregon.

Q. What? A. He was a man in Oregon.

Q. In Oregon? A. Yes.

Q. And Walter Johnson?

A. He lived in Idaho. He is a neighbor.

Q. And J. P. Lane?

A. He is my neighbor. He lives in Idaho. [94]

Q. I notice a check given to Hartley marked "hay \$41.50," April 17th?

A. Well, I got some hay from him and that's when I paid him for it.

Q. Yes. Another one to Walter Johnson, April 28, '56? A. That's right.

Q. \$150.?

A. That's right. I got hay from him.

Q. And Lane, April 27, \$205?

A. That's right.

Q. Now, back as far as October 24th did you buy some feed from a man by the name of Daily?

A. Who?

Mr. Shepard: What year?

Mr. Donart: '55.

A. What was the name?

(Testimony of Clayton A. Butcher.)

Mr. Shepard: Well, it looks like Dilly but the P's are both crossed. It might be Ditty.

A. Ditty. I didn't buy hay, I bought corn ensilage.

Q. That was in October? A. Yes.

Q. And what did you buy from Albert Meier that you gave him a check for on October 5, 1955?

A. I bought corn ensilage.

Q. And what did you buy from Walter Johnson on October 8 [95] that you gave him a check for \$50? A. I bought some hay.

Q. And there is a man—that looks like S. H. Roberts? A. That was hay.

Q. When did you buy—The check is given September 18, 1956?

A. That is when I was finished paying him for his hay.

Q. That's what?

A. That is when I finished paying him for his hay. I'd done some work for him. We hadn't got it straightened out. I helped him with some work on the ranch and we hadn't gotten straightened out and I owed him the balance of that on the feed.

Mr. Donart: I believe that is all, sir.

The Court: Now, if I understand your testimony correctly, all of these amounts, represented by those checks were paid for for feed which you fed to the Yost cattle, is that right?

A. That's correct.

The Court: Go ahead, counsel.

(Testimony of Clayton A. Butcher.)

Mr. Shepard: That's all we have of this witness.

(Witness excused.)

PAT PARKER

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: State your name and occupation for [96] the record.

A. Pat Parker.

Direct Examination

Q. (By Mr. Shepard): What is your occupation, Mr. Parker?

A. I live on a ranch and I feed cattle.

Q. Where is this ranch?

A. Four miles north-west of Nyssa, Oregon.

Q. And how long have you been connected with cattle?

A. The last 12 years, exclusively.

Q. Did you deal in or with cattle prior to that time?

A. Yes, mostly in milk cattle, milk stock.

Q. What particular type of dealing in cattle have you done in the last 12 years?

A. Well, I have got out and sold a lot and I fed probably an average of 800 cattle a year for the market.

Q. Have those been all types of cattle insofar as age is concerned? A. Yes, sir.

Q. You are acquainted with the defendant,

(Testimony of Pat Parker.)

Butcher, in this case? A. Yes, I am.

Q. Approximately how long have you known him? A. About 8 years.

Q. Would you consider yourself a friend of his? A. Yes, I would. [97]

Q. During the winter months of the years——
Strike that.

During the months of December, 1955, January, February and March, 1956, would you state what the weather was during those months?

A. Well, I would say it was very changeable and very muddy and——

Q. What effect would that particular type of weather have on a cattle feeding operation?

A. Well, it had a very bad effect on mine, the fact that they had to lay in mud, and it's hard for them to get their rest. Cold weather automatically takes more feed to produce the pound of gain on cattle, when it's cold.

Q. You were feeding cattle yourself that winter? A. Yes, I was.

Q. Approximately how many head were you feeding, Mr. Parker?

A. Well, through the winter months, I would say about 400.

Q. What was your experience, as far as being able to put any weight on those cattle, during those months up until March of '56, on the cattle which you were feeding?

A. Well, I had three or four distinctly different kinds of cattle. I had some cows I was

(Testimony of Pat Parker.)

feeding and some yearling heifers and weaner calves.

Q. What was your experience in putting weight on those [98] weaner calves during those months, Mr. Parker? Was it difficult or did they take weight easily?

A. Well, it was very hard to get any gain on those cattle through the worst period of the winter.

Q. And what was your experience in regard to weight gain after—Strike that.

I will ask it this way:

When did that changeable wintery weather end during the spring of 1956, approximately, as you can remember?

A. Well, I would say along the first of March, between the 1st and the 15th, possibly. I don't remember exactly.

Q. And what was your experience from the 15th of March on in being able to put weight gain on cattle, Mr. Parker, especially weaner calves?

A. Well, it's much easier when the weather is warm.

Q. Did you find that your calves gained substantially more during that period of time?

A. Yes, I did.

Q. Are you acquainted with the operation conducted by Mr. Butcher on his ranch?

A. Well, I fed cattle there one year myself and he has fed some for me.

Q. During the period of time, from the 1st of December, 1955 until the 1st of April, 1956, did

(Testimony of Pat Parker.)

you have occasion to see those cattle which Mr. Butcher was feeding on his place? [99]

A. I saw them twice.

Q. Approximately, when was the first time that you saw them, in time?

A. Well, I had some feeders and racks left there from the year before and I went and got those approximately the 10th of December.

Q. And will you state in what condition, in your opinion, those cattle were as you looked at them at that time?

A. Well, just an average stock condition, I would say, probably comparable to all the cattle at that time of the year in the country.

Q. All the cattle in that area?

A. That's right.

Q. What, if you know, was the condition of all the cattle in that particular area, Mr. Parker, during those months? A. Well—— [100]

Q. Those Winter months?

A. Well, up until December, I would say it was an average year, but from then on until Spring it was exceptionally rainy and muddy, and it would freeze up and thaw out. There were times when I had to have a team to feed my cattle with, I couldn't get through the roads with the truck.

Q. You couldn't get a truck in and feed them, is that correct? A. That's correct.

Q. What, if you know, was the experience with disease in cattle during those months of January

(Testimony of Pat Parker.)

and February of 1956 throughout the general area?

A. Well, my experience with weaner calves, shipping fever is always prevalent among them, and the worse the weather is the more you are going to have of it.

Q. Was there a lot of that fever around that year because the weather was so bad?

A. Yes, there was.

Q. What would you estimate would be the average loss per hundred head throughout the area by reason of cattle disease that particular Winter?

A. Well, I don't remember mine but in the all over picture I expect about a 3 per cent death loss from the time the calf is weaned until the time you turn him out the next Spring.

Q. That would be on an average?

A. An average, normal death loss. [101]

Q. Assuming, Mr. Parker, that a person fed 397 head during the winter season of weaner calves and only lost 1 calf, would you say that that was an extremely low death loss to sustain?

A. I would say it was exceptional.

Q. You stated that you observed the cattle in December. Did you then observe them again?

A. Yes. Approximately the 1st of March.

Q. The 1st of March of what year?

A. '56.

Q. And '56. And in what condition were they at that time, during the first of March?

(Testimony of Pat Parker.)

A. Well, I would say the average of all calves in that size range in that community.

Q. Were they starving to death? A. No.

Q. Were a lot of them down, next door to dying?

A. No. They seemed to be all pretty healthy, outside of maybe 30 or 40, I don't know how many there was, that he had under a shed there that he had been treating.

Q. What do you mean by treating, Mr. Parker?

A. Well, pneumonia and shipping fever. The cattle didn't feel quite up to par. The cattle, as I observed them, were in average wintering condition.

Q. Mr. Parker, state if you know what the market value of a ton of ensilage was in the period of time from December [102] of 1955 to April of 1956?

A. Well, I put in about 650 ton in the fall of 1955 and I gave \$8.00 for it delivered into the pit.

Q. Do you have an opinion as to the value of hay during that period of time per ton?

A. Well, I believe I bought hay twice and I gave \$25.00 for the first I bought, chopped and delivered at my feed lot, and the last hay I bought, I think there was about 80 ton of it, and I paid \$27.00 for it chopped and delivered, stacked up in my feed racks.

Q. How about ear corn and grain, do you have an opinion as to the value of that per ton during that period of time?

(Testimony of Pat Parker.)

A. Well, I bought some corn in Apple Valley for \$42.00 a ton. That was the end of the year. And all the barley I bought was processed with molasses in it ready for feeding and I gave \$52 for that.

Q. Would you say \$1.00 an hour would be a reasonable wage to pay ranch hands during that period of time, Mr. Parker?

A. No, I wouldn't.

Q. Would that be too low or too high?

A. Well, I would say that was about an average in the winter time, \$1.00 to \$1.25 an hour.

The Court: Speak up a little bit, Mr. Parker.

A. All right.

Mr. Shepard: You stated \$1.00 to \$1.25 an hour? [103] A. Per hour.

Q. Have you ever had occasion to rent any land for the purpose of feeding cattle over winter, Mr. Parker?

A. Well, the last winter, in '56 and '57, I fed all my cattle at Oregon Feeding Company in Ontario Oregon and this schedule called for \$0.035 per day per head if you fed them. If you furnished the feed and they fed them, the rental was \$0.07 per day for the rental and the feeding. The rental alone was \$0.035 per day per head.

Q. Would you say \$1.50 an hour would be an unreasonable rental valuation for a tractor and loader? A. No, I wouldn't.

Q. Would you say that \$1.00 an hour would be an unreasonable sum for the rental of trucks?

(Testimony of Pat Parker.)

A. No, sir.

Mr. Shepard: I think that is all.

Cross Examination

Q. (By Mr. Donart): I understood you to say your cattle put on some weight after March, 1956, your weaners, in your feed lot?

A. That's right.

Q. About how much did they put on, in your estimation, per day?

A. Well, it has been my experience that one pound per day under good conditions is a very good gain for weaner calves. [104]

Q. Is that about what yours put on?

A. The entire winter, much more.

Q. What did they put on in March, after, as you said, the weather warmed up, in March?

A. Well, I think probably one pound and a quarter a day.

Q. Do you think they put on one pound and a quarter? A. Yes.

Q. Now, what were you feeding them?

A. Feeding grain, beet pulp, ensilage, and chopped hay.

Q. All right.

A. Some of those cattle I fed potatoes to them.

Q. Now, let's just assume you didn't have any beet pulp. Suppose you fed them on chopped hay, ensilage and grain, how much chopped hay per day would you have to feed to them, and how much ensilage and how much grain?

(Testimony of Pat Parker.)

A. Well, I have never kept very close track of that. I feed mine all they will eat, all of them except grain.

Q. Couldn't you estimate about what you fed to them? You're a cattle feeder of experience.

A. Well, I would estimate that a weaner calf in March, from then on until the time he went to grass, would probably eat 20, maybe 25 pounds of ensilage.

Q. 20 to 25 pounds of ensilage. How much hay?

A. Oh, between 5 and 10 pounds, probably 8 pounds. That is all governed by how much grain you give them. [105]

Q. All right. Where you were only feeding from 2 to 3 pounds of grain, that is all you fed to them, that much ensilage and that much hay, 2 to 3 pounds would be grain.

A. That would be about an average feeding for light cattle.

Q. Now, you said 20-25 pounds of hay, and that hay, I believe you said, costs at that time a minimum of \$25.00?

A. I didn't say 20 or 25 pounds of hay.

Q. I beg your pardon. Ensilage.

A. That's right.

Q. And that was \$8.00 a ton?

A. \$8.00 a ton put in, and I think anybody will tell you that you have possibly a 15 per cent loss on your tops and bottoms, the mold that you have to throw away.

(Testimony of Pat Parker.)

Q. Yes. So it really costs you around \$10.00 a ton?
A. That's right.

Q. All right. Let's put it at \$10.00 a ton. That is a half a cent a pound?
A. That's right.

Q. Is it not?
A. That's right.

Q. Then your ensilage cost per day would be from 10 to 12 and a half cents, would it not?

A. That's right.

Q. And 5 to 10 pounds of hay. Hay, according to your figure, was worth about a cent and a quarter a pound, wasn't it? [106]

A. Yes.

Q. And on 5 to 10 pounds would be about 8 or 9 cents a day, wouldn't it?

A. That would be about right.

Q. And your grain at that time was worth what? I thought you said \$52.00.

A. \$52.00 for mixed grain ready to feed.

Q. That would be about, at least, 2 and a half cents a pound, wouldn't it?
A. Yes, sir.

Q. And it takes a minimum of 2 pounds. That would cost at least 5 cents, wouldn't it?

A. Yes.

Q. Is that right?
A. That's right.

Q. Now, to feed 397 head of cattle, was that a job for one man or was that a two man job?

A. Well, it's possibly a man and a half job.

Q. All right. How many man hours per day?

A. Well, at the present time I am feeding about that many cattle and I have a hired man full time

(Testimony of Pat Parker.)

and I almost always help him till noon. I would say it required 12 man hours a day.

Q. You would say it would have taken at least 12 man hours a day?

A. That's right. No, that could be governed by the amount [107] of equipment and machinery you had. Some people have feed boxes and it doesn't require that much time.

Q. Well, you know the equipment that the defendant has, do you not? A. Yes, I do.

Q. I want you to express it in terms of that equipment, would it have taken about 12 man hours per day?

A. That is what it takes to feed mine.

Q. Well, is that what you estimated would have taken to feed under the conditions that the defendant was feeding under? Did he have more favorable or less favorable conditions than you had?

A. Well, he has a better loader than I have. I would say about comparable.

Q. The two of them are about comparable.

Now, how many man hours per day would you use the tractor?

9. Oh, that could be governed by how many times you have got stuck and how often you had to pull it out. But I would say an average of 3 or 4, maybe 4 hours a day.

Q. How many man hours a day for the truck?

A. Well, your truck is on the job all the time.

Q. Yes. It would take 12 man hours per day—It would take less than that, probably?

(Testimony of Pat Parker.)

A. Well, while you are loading your truck is sitting still. [108]

Q. I know, but when you hire a truck you pay for it whether it is sitting still or in motion, don't you?

A. Well, yes, I suppose. I never rented one.

Q. What I was getting at, you had 12 man hours but that was expended by 2 men.

A. That's right.

Q. And I believe you said one of them was working about half time? A. That's right.

Q. So would you say about 8 hours per day for the truck?

A. It would be on the job that much, yes, sir.

Q. All right. Then the labor in feeding, 12 man hours at \$1.00, and say 3 hours to the tractor at \$1.50, it would be \$4.50, and 8 hours for the truck would be \$8.00, would it not? A. Yes.

Q. That would be about \$16.50 a day for labor, wouldn't it? A. Yes.

Q. And according to your figures, from 10 to 12 and a half cents for ensilage. Let's take the lower figure of 10.

9 cents for hay.

5 cents for grain.

There would be 24 cents per head per day for feeding? A. Yes.

Q. You figure you could put a pound and a quarter on, is that your estimate? [109]

A. I said that you could put on a pound and a

(Testimony of Pat Parker.)

quarter when the weather conditions and everything——

Q. That is what I mean, under good weather conditions, like you would have from March on, you could put on a pound and a quarter a day?

A. That's right.

Q. All right. Now, at 15 cents a pound, a pound and a quarter would bring a man between 18, 19 cents?

A. That would make it approximate, yes.

Q. And that would cost 24 cents for feed, plus \$16.50 a day for labor and hiring equipment?

A. \$16.50 per day on how many head?

Q. On the 400, on the whole group—397 head.

I think that is all.

Redirect Examination

Q. (By Mr. Shepard): Mr. Parker, Mr. Donart asked you about this, that you might expect a pound and a quarter gain, isn't that correct, per day?

A. Yes, sir, under all favorable conditions, providing everything was—the weather, was warm——

Q. That would be for the entire term, it would be an average daily increase for the term of 150 days, is that correct? A. No.

Mr. Donart: That is objected to as leading and [110] suggestive and not in accordance with the witness' former testimony.

The Court: Change the form of the question Mr. Shepard.

Q. (By Mr. Shepard): If you weighed the cat-

(Testimony of Pat Parker.)

tle at the beginning of the month of February in 1956 and then weighed them at the end of the month of February of 1956, in your opinion would there be a pound and a quarter gain during that period?

A. No, I don't think there would. The weather doesn't permit that kind of a gain during a cold winter month.

Q. Mr. Parker, assuming that those calves had been delivered—those 400 head of calves, had been delivered to Mr. Butcher's place right out of a feeding yard and had been transported across approximately 4 miles to his ranch and had been stuffed full of feed and water immediately prior to their leaving the lot, would you have an opinion as to how long it would take to get that weight back again?

Mr. Donart: That is objected to as being entirely outside the issues of this case.

The Court: The objection is sustained.

Mr. Shepard: That is all.

Mr. Donart: That is all.

The Court: I am handing to the Clerk what has been admitted in evidence as Defendant's Exhibit No. 7, consisting of a series of checks. My rough calculations indicate that they [111] indicate a sum of \$2,551.70. That is subject to correction.

(Witness excused.)

ALBERTA GRACE MORROW

called as a witness on her own behalf, being first duly sworn, thereupon testified as follows:

The Clerk: State your name for the record.

A. Alberta Grace Morrow.

Direct Examination

Q. (By Mr. Shepard): Mrs. Morrow, where do you reside, ma'am?

A. Well, my address is Cottonwood, Idaho.

Q. And approximately how far is that from Perma, Idaho? A. Well——

Q. About 200 miles, roughly?

A. Well, it's a little further than that, I think. I wouldn't be positive.

Q. And that is north of here? A. Yes.

Q. And you reside and operate a cattle ranch in that area, is that correct?

A. Yes, about 25 miles from Cottonwood.

Q. And approximately how many acres do you operate in that area? A. 18,600.

Q. 18,600 acres. Will you describe very briefly the type [112] of country this is, is it very remote country from any town or city of any size at all?

A. Yes, it is. It is pretty much isolated.

Q. Is your ranch largely divided into two areas, a summer range and a winter range? A. Yes.

Q. And is your winter range even more remote than your summer range? A. Yes, it is.

Q. Is it difficult to get to?

A. It is isolated completely, with the exception of——

(Testimony of Alberta Grace Morrow.)

Q. What is your method of transportation in and out of that winter range during the winter?

A. I didn't understand the first part.

Q. What is the only way you can get in and out of that winter range during the winter?

A. Well, you can go in and out by horseback until the snow gets too deep on the mountain. Then you have to travel by boat, if the river isn't froze up.

Q. In other words, you come up the Snake River from the City of Lewiston to get to your ranch?

A. Yes.

Q. If the river isn't frozen?

A. When it isn't.

Q. How often during the month of December of 1956 and [113] January, February and March—I beg your pardon, December 1955 and January, February and March of 1956, did you get out from your ranch?

A. Well, I most generally try to spend Christmas with the girls here in Parma.

Q. At Parma? A. Yes.

Q. Did you that year? A. Yes.

Q. How many days, approximately—. When you say "the girls," you mean Mrs. Butcher?

A. Yes.

Q. At Parma?

A. And Dolores, the boys.

Q. And Mrs. Butcher is the wife of Clayton Butcher, the defendant in this case? A. Yes.

(Testimony of Alberta Grace Morrow.)

Q. You did spend that winter with them?
I mean, that Christmas with them?

A. Yes, sir, for about three days, I think.

Q. And where did you spend all the rest of the time during that winter?

A. On my ranch.

Q. And how many people operate that ranch, Mrs. Morrow?

A. Myself and one hired man.

Q. You and your hired man?

The Court: I didn't hear you, Mrs. Morrow, and what?

A. Myself and one hired man.

Q. (By Mr. Shepard): And approximately how many head of cattle do you run up there?

A. Between 700 and 800.

Q. And that is a full time job for you and this one hired man?

A. Full time.

Q. Mrs. Morrow, had you ever met Mr. Yost prior to your signing this note and mortgage?

A. One time, at Ontario.

Q. I can't hear you.

A. One time, at Ontario, Oregon.

Q. And when was that, approximately?

A. Well, it was quite a while before this.

Q. Well, how long, do you mean a matter of six months prior to signing?

A. Oh, it was two or three years before.

Q. Two or three years. You had no conversation at that time about signing any note?

A. Well, I scarcely knew him.

Q. I beg your pardon?

(Testimony of Alberta Grace Morrow.)

A. I scarcely knew him at all. [115]

Q. Did you talk to him at the time you signed this note at all? A. No.

Q. Will you state where, if you know, you actually signed this note?

A. Down at Nyssa.

The Court: Where?

Mr. Shepard: Where. Speak up so we can hear you.

A. At Nyssa.

The Court: Nyssa?

A. Yes.

Q. (By Mr. Shepard): And was that at Mr. Henigson's office, the lawyer down there?

A. It was an attorney. I just don't know who, what his name was.

Q. Was that lawyer there at the time you signed? A. Yes.

Q. Had you ever hired him as a lawyer?

A. No.

Q. He didn't represent you?

A. No. In no way.

(Handing the witness the Exhibit No. 2.)

Q. (By Mr. Shepard): Now, Mrs. Morrow, on that is your signature that appears, on that mortgage, is that correct?

A. I will have to get my glasses. [116]

Mr. Donart: That is objected to. They admit the execution of the note and the mortgage.

The Court: You admit it in the Answer?

(Testimony of Alberta Grace Morrow.)

Mr. Shepard: Yes. I expect her answer to be that she did that, it is her signature.

The Court: It is of no consequence. Let her identify the signature.

Mr. Shepard: I am merely trying to familiarize the witness with that exhibit.

May I approach the witness?

The Court: Yes.

Q. (By Mr. Shepard): That is your signature that appears on that document? A. Yes, it is.

Q. Did you read that instrument prior to the time that you signed it, Mrs. Morrow?

A. No, I didn't.

Q. Did the lawyer merely point out where he wanted you to sign and you signed it, is that correct? A. Yes.

Q. Did you have any conversation with that lawyer at that time as to whether or not you owned any of that feed?

Mr. Donart: That is objected to as not being within the issues.

The Court: Sustained. [117]

Let me ask this question, did you know anything about this transaction at all?

A. No, I didn't.

The Court: Did anybody explain to you why you were being asked to sign that mortgage?

A. Well, on account of I owned the property where it was raised.

The Court: That was the only purpose?

A. That was the only purpose.

(Testimony of Alberta Grace Morrow.)

The Court: The only purpose in having you sign it?

A. Yes, it was.

The Court: They told you. Now, you own the property, and, in order to protect ourselves in the event you should decide to run us off the land, we would like your signature on it?

A. Right.

The Court: Is that right?

A. That's right.

Q. (By Mr. Shepard): Did you ever receive any money from Mr. Yost on this? A. No.

Mr. Donart: That is objected to as being immaterial.

The Court: Overruled. The answer is "no."

Q. (By Mr. Shepard): Did you have any interest in the feed and which was the subject of that mortgage? [118] A. No, I did not.

Q. Did Mr. Butcher have any interest in any feed that was on your property at your other ranch? A. No, I didn't.

Q. Did he have any interest or any title in any of the cattle that you ran on your ranch?

A. No.

Q. Did you have any interest in any of the cattle that might be running on his ranch?

A. No.

Q. Did you sign any agreement with Mr. Yost about feeding any cattle? A. I did not.

Q. Did you talk to Mr. Yost about any agreement for cattle feeding? A. No.

(Testimony of Alberta Grace Morrow.)

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused.)

ALBERT MEIER

called as a witness on behalf of the defendants, being first duly sworn, thereupon testified as follows:

The Clerk: State your name and occupation for the record.

A. Albert Meier, I am a farmer. [119]

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mr. Meier?

A. I live at Parma, Idaho, or near Parma, on a ranch.

Q. Where do you reside in relationship to Mr. Butcher's ranch?

A. Approximately one mile from him.

Q. You are neighbors, so to speak?

A. Yes.

Q. You are acquainted with Mr. Butcher?

A. Yes.

Q. How long have you resided at your ranch up there? A. Probably 15 years.

Q. You have known Mr. Butcher considerably during that time?

A. Yes, in the last six years, possibly.

Q. During the year or during the month of December 1955 to January, February and March of

(Testimony of Albert Meier.)

1956 will you state what agreement you had if any with Mr. Butcher to furnish him hay?

A. Well, I never furnished Mr. Butcher any hay.

Q. Ensilage. I beg your pardon.

A. Well, in the fall of——

Q. Speak up, Mr. Meier, it's hard for us to hear.

A. In the fall of 1955 I had 30 acres of corn growing on some land that I had rented from Mr. Butcher and I made an [120] agreement with him to sell it to him and put it in the pit as ensilage.

Q. I can't hear you, Mr. Meier, you're going to have to speak louder.

A. Well, during the summer of 1955 I had 30 acres of corn growing. I made an agreement with Mr. Butcher to place this as ensilage in his pits.

Q. Was that ensilage so placed in his pit?

A. Yes.

Q. When did that take place?

A. It would be in September.

Q. Do you know how much was placed there, by tonnage? A. 472 ton.

Q. 472 ton? A. Yes.

Mr. Shepard: That is all.

Mr. Donart: That is all.

(Witness excused)

Mr. Shepard: The defendant will rest, if your Honor please.

The defendant Morrow will renew her Motion, as stated to the Court prior to this time.

The Court: Do you wish to be heard on the Motion with respect to Mrs. Morrow?

Mr. Donart: Our position is her signature appears [121] on the note and the mortgage. Why she signed that doesn't effect her liability. She doesn't complain that she was defrauded. She says Yost never talked to her in his life.

The Court: Motion to Dismiss as to Mrs. Morrow is granted.

Any rebuttal, Mr. Donart?

Mr. Donart: Yes, I think we have some rebuttal.

(Short recess taken.)

(Whereupon, documents marked for identification, respectively, Plaintiff's Exhibits 8 and 9.)

The Court: Have you had an opportunity to see these exhibits?

Mr. Shepard: No, your Honor. I don't want to unnecessarily delay the Court but I think we are getting into an area of specific and precise weights, and, as I stated to the Court, I have never seen these before. Before I would be able to make any intelligent objections on them, I would like to advise your Honor it would take at least the ability to examine them some little time as to these specific weights. Now, if he wants to preliminarily examine this witness as to what these are, where he got them, what they purport to be, it would be all right at this time, but to go on to the specific weights shown here, I would like a little extra time at this point.

The Court: The witness, the plaintiff, Mr. Yost, can examine them preliminarily. I won't admit them into evidence [122] until you have had an opportunity to voice an objection.

JAMES R. YOST

called as a witness, in rebuttal, in his own behalf, having been previously duly sworn, thereupon testified as follows:

(Whereupon, documents marked for identification, respectively, Plaintiff's Exhibits 10, 11, and 12.)

Direct Examination

Q. (By Mr. Donart): Mr. Yost, you have been handed exhibits marked Plaintiff's Nos. 8, 9, 10, 11 and 12. Will you take them each by number and tell the Court what each one of them is?

Mr. Shepard: I am going to object to that procedure, if your Honor please. We are here in a very narrow area. No, as to what they are, he's going to have to establish, if he knows, to my satisfaction at least, if the Court please.

The Court: Well, do you know what those exhibits that you hold in your hand are?

A. Yes, sir, I do.

The Court: He can describe what they are. I am not going to make any fuss about that. Subject to your objection, of course, as to their admission.

Mr. Shepard: All right, your Honor.

Mr. Donart: Tell us what they are?

A. This is Exhibit No. 8. It is a complete record

(Testimony of James R. Yost.)

of the weights of the cattle that was weighed. [123]

Mr. Shepard: I am going to object unless some foundation is layed to show that he weighed the cattle and those are his figures on them. We are getting into hearsay.

The Court: Did you weigh the cattle yourself?

A. No, sir. They were weighed by the Nyssa Elevator, and they are signed by the people who operate that, disinterested parties.

The Court: Were you present when they were weighed?

A. No, sir, none of us were. They were weighed by a disinterested party at this establishment.

The Court: Why didn't you ever give those weights to Mr. Butcher?

A. These were given to Mr. Butcher. I took these weights to his house, and I have here a ribbon from Mr. Butcher's adding machine, that she totaled the weights on these cattle.

The Court: The objection is overruled.

Q. (By Mr. Donart): All right, what are the other exhibits?

The Court: Go ahead.

A. Can I proceed?

The Court: Yes.

A. These weights here listed on Exhibit No. 9 are the total weights out of the Butcher feed lot. These were also taken to the Butcher's residence, totaled by Mrs. Grace Butcher, Clayton Butcher and myself at the time the deal was completed.

(Testimony of James R. Yost.)

These weights show the difference between the weigh-in and the weigh-out of these cattle.

Q. (By Mr. Donart): Don't tell what it is. Just what are the other exhibits, you have got 8 or 9 now.

A. Exhibit 11 is a ribbon from the typewriter of the total number of weigh-in.

Q. And who made that exhibit 11, what typewriter or what ribbon?

A. It was made on Grace Butcher's adding machine.

This is Exhibit 10, is the slips from the sale yard of the purchase of these cattle that I bought that went to the Butcher feed lot.

Q. What is the next exhibit?

A. I didn't hear you George.

Q. What is the last exhibit?

A. This is Exhibit 12. This is also a total of the weigh-in of the Stringer cattle as they was weighed at the Nyssa Elevator.

Q. Do you have the total weigh-out of your cattle?

A. The total weigh-out of my cattle?

Q. Yes. A. Yes.

Q. Does the exhibit you have show all of your cattle, the 97 head, the 96 that belonged to you, or is there something missing from that? [125]

A. There is 20 head of these cattle that I did not find the slip from the sale yard for.

Q. You didn't find when?

A. Yesterday when I looked for them. I had the

(Testimony of James R. Yost.)

slips at the time that these slips were taken to Butcher when they were weighed in but sometime during the summer I misplaced them. I went to the sale yard to get another copy of the 20 head of steers and I couldn't find them, but this recording of weights here is the weight that I had recorded in my books that I kept this account in.

Q. Now, we understand you to say that you took a complete set of steer weights to Mr. Butcher's house? A. Yes, that's right.

Q. When was that, with respect to the time when the cattle were taken off the feed yard?

A. I can't tell you the exact date. The last of the cattle were removed the 4th and 9th. It would be March the 9th. No, it was within two to three days after these cattle were removed.

Q. And at that time state whether or not Mr. Butcher and you had a discussion as to whether those were the correct weights, the amount of gain and the amount on all of the cattle——

A. Mr. Butcher——?

Q. No, did you have such a discussion?

A. Yes, we did.

Q. All right. Now, tell us what was said between you and [126] Mr. Butcher?

A. After these weigh-out receipts were totaled we arrived at the figure that was due me from the loan that I had made Mr. Butcher. He informed me that he could not pay it but that he would go and call on Mrs. Morrow and see if we could per-

(Testimony of James R. Yost.)

suade to pay the unpaid balance of this, the amount of money due me from my loan.

Q. Did you make a memorandum at that time as to the amount due you and the offset against it?

A. Yes, I did.

Mr. Donart: Mr. Bailiff, will you hand this to the witness?

The Court: What is it?

Mr. Donart: I doubt if it is admissible as an exhibit. It is a memorandum that he made. I was going to ask him to use it to refresh his recollection from.

The Court: He may do that.

(Witness examining.)

Q. (By Mr. Donart): Do you have before you the memorandum? A. I do.

Q. Was that made while the material set forth there was fresh in your memory?

A. This was made immediately after the settlement with Mr. Butcher on the weights.

Q. All right. What does the memorandum show?

A. It shows 396 head of weaners, the total weight of 161,080 pounds into the feed lot in November. It shows 396 head of weaners, weighed 166,940 pounds weighed out in April.

That makes a total of 5,860 total gain of cattle on the feed lot with the 3 per cent shrinkage.

Mr. Butcher earned a total of 879 pounds (sic) on his contract.

Q. You mean pounds or dollars?

A. Dollars. Beg your pardon. At 15 cents a

(Testimony of James R. Yost.)

pound, 5,860 pounds, he earned \$879 on his loan. And the \$163 for pasture makes a credit on his loan for \$1,042, leaving a total due me of \$6,258 at 6 per cent interest.

The Court: How much is that again?

A. The last figure, your Honor?

The Court: Yes.

A. \$6,258.

The Court: Plus interest?

A. Plus the 6 per cent interest.

Mr. Donart: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Shepard): Mr. Yost, how much poundage does that represent again, do you claim?

A. Well——

Q. Do you have the figures there? [128]

A. I have the figures.

Q. What does that represent, how many pounds?

A. It would represent a total of 14 pounds over the entire feeding. Per head of the 128 days. It would represent 14 pounds per head, gain, not per day, but for the 128 days.

Q. When you put those cattle in there did you agree with Mr. Butcher as to the ration that was to be fed those cattle?

Mr. Donart: That is objected to as not proper cross examination.

The Court: Do you wish to be heard on that, Mr. Shepard?

Mr. Shepard: I think it can be tied up. After

(Testimony of James R. Yost.)

all, here, I think, we are into a very broad speculative atmosphere as to the weight that was gained. That has been the testimony. I think I am entitled to test how he gets to it.

The Court: I will allow it.

Q. (By Mr. Shepard): Did you agree with Mr. Butcher as to the ration that was to be fed those cattle during that 158 day period in writing?

A. Those cattle were turned over——

Q. Just answer the question, did you or didn't you, Mr. Yost?

A. Those cattle were in Mr. Butcher's possession.

Q. Did you agree in writing as to the ration that was to be fed them? [129]

A. In his contract, yes.

Q. And you assumed that that would be correct to feed those cattle through the winter, is that correct?

A. That's right.

Q. Is that correct?

A. That's right. Yes.

Q. And did you state that this was not an abnormal winter?

A. I would say it was an average winter that we had.

Q. It was an average winter?

A. I would say so, yes.

Q. What did you state that cattle would gain per day, in your opinion?

A. They should gain on that ration, they should gain a pound per day.

(Testimony of James R. Yost.)

Q. A pound per day. They should gain a pound per day.

How long were those cattle in there?

A. They were in there 128 days.

Q. 128 days? A. Yes.

Q. And that was all of them or just steers?

A. All of them.

Q. So theoretically they should have gained a 128 pounds? A. That's right.

Q. At least? A. That's right. [130]

Q. You state in your Answer to the cross-complaint that the reason that you took those cattle out of there was he had exhausted all that feed?

A. That's right.

Q. So he had obviously fed them their ration during that 128 days, is that correct?

A. That's correct.

Q. And yet instead of gaining 128 pounds, the way you would expect them to, they only gained 14, even though they were fed that much, is that correct?

A. I have no way of knowing how much they were fed.

Q. Well, the feed was all gone, wasn't it? That is what you said in your Cross-Complaint.

A. That's right, the feed was all gone. But there was other cattle there too, that could be—to be fed.

Q. Do you know whether any of that feed was fed to those other cattle?

A. I saw him take ensilage out of the same pit that he was feeding my cattle out of, yes.

(Testimony of James R. Yost.)

Q. Theoretically, those cattle should have a gain of 128 pounds? A. That's right.

Q. And they only gained 14 a head?

A. That's right.

Mr. Shepard: May I examine those exhibits?

The Court: You may.

Mr. Shepard: If your Honor please, to save a little time, could I approach the witness and examine him on these?

The Court: Yes.

Q. (By Mr. Shepard): Handing you that which has been marked Plaintiff's Exhibit 9.

Did you state that those were in-bound or out-bound weights?

A. These are out-bound weights.

Q. And where did you get those?

A. I got these from the Nyssa Elevator. You see their name on top of there. And they are also signed by the fellow that worked in the office in this business.

Q. I note on here, there is stamped on here "gross" weight or the terms "gross" and "tare."

A. That's right.

Q. If you know, what does the "gross" refer to there?

A. The "gross" is the total weight of the cattle and the truck.

Q. And the "tare"?

A. The "tare" is the truck that is weighed back—that is subtracted from the gross weight.

Q. Tell me again, I keep getting confused here,

(Testimony of James R. Yost.)

Mr. Yost, as to in-bound or out-bound. This exhibit——

A. This exhibit is of out-bound weights. [132]

Q. Out-bound weights? A. That's right.

Q. Now, to weigh these cattle correctly out-bound, what procedure should be gone through?

A. I don't quite understand your question as to the procedure.

Q. The correct procedure to go through in weighing out cattle like these, would be to load, or, rather, to weigh a truck empty, load it with cattle, and then weigh it again, is that correct?

A. That's right. Yes, that is customary.

Q. And then before you load it with cattle again you should weigh it empty again, shouldn't you?

A. That's right.

Q. Why is that?

A. To determine the weight of your truck back for your other load.

Q. In other words, the truck can vary a great deal between one load and another, can it not?

A. That's right.

Q. How much could it vary?

A. I wouldn't know.

Q. Could it vary 7500 pounds?

A. Well, I wouldn't want to say, I don't know. I don't know how much your variation would be on your truck. [133]

The Court: I can't hear you.

A. I don't know what the variation would be on the weight.

(Testimony of James R. Yost.)

Q. (By Mr. Shepard): Let's assume you had 12,000 pounds of cattle in the truck and then you weighed the truck back, would it be unusual to find a 7500 pound differential in the truck?

A. I wouldn't know.

Q. It would be pretty ridiculous, wouldn't it? The only difference in that weight could be the manure that the cattle left in the truck, couldn't it?

A. Well, that's right. Whatever they would shrink or whatever they would leave in the truck.

Q. Now, were all these hauled by the same truck?

A. They were hauled back by the same truck and they were weighed in and out under the same conditions, over the same scales, and weighed by the same people.

Q. Insofar as you know?

A. Insofar as I know.

Q. You weren't there?

A. I wasn't there. We have the same signatures on the tickets.

Q. Do I understand you to say—I don't believe I understood you correctly, you don't mean that these tickets here represent the same truck going over those scales time and time again? There are a number of trucks represented here. [134]

A. That's right, they are not the same trucks but they are the same fleet of trucks.

Q. And the trucks wouldn't weigh the same, would they?

A. I think the trucks would weigh the same.

(Testimony of James R. Yost.)

Q. Do you know what make they were? Do you know what make they were? A. No, I don't.

Q. Do you know anything about the weights of the trucks? A. No.

Q. So far as you know, they might or might not weigh the same? A. Well, I suppose so.

The Court: What is your answer?

A. He wanted to know the difference in the weights.

The Court: No, that's not his question.

(Record read by Reporter.)

A. I don't know what the variation would be on the trucks.

Mr. Shepard: If your Honor please, I am going to object to the admission of or consideration in any way of this particular Exhibit 9 for the sole reason it has not been sufficiently—sufficient foundation has not been laid to show what they are. I think I should be entitled to enquire as to the various trucks that were used, how they were weighed and this weight differential, and there is no way I can learn that from examining this witness at all, if your Honor please. [135]

The Court: That is your problem, sir.

Mr. Shepard: I will object to their admission in this instance on that ground.

Mr. Donart: The exhibits were offered——

Mr. Shepard: I would like to continue on with some of these.

Mr. Donart: Well, I understood that the Court was——

(Testimony of James R. Yost.)

The Court: I want to hear from Mr. Donart on this last objection, briefly.

Mr. Shepard: Oh, I see.

Mr. Donart: These exhibits were taken to the defendant and, with the aid of those exhibits, they agreed upon what the in and out-bound weights were, and the amount of money that was due. The witness testified that this was run up on the defendant's own adding machine.

The Court: The objection is overruled. They will be received in evidence.

(Whereupon, Plaintiff's Exhibits Nos. 8, 9, 10, 11 and 12 for identification were received in evidence.)

Mr. Donart: I might say that there is a patent error in one of those scale weights. It shows an error of subtraction, but it is 4,000 pounds in the defendant's favor.

Mr. Shepard: Are there any other errors in the exhibit, as far as you know, Mr. Donart?

Mr. Donart: I just found that one. It was pointed [136] out to me. But we agreed on it so we are not trying to renege on it now.

Mr. Shepard: If your Honor please, I am going to request that we be granted a brief recess, for at least 15 minutes to examine these, and see if we can determine errors.

The Court: All right.

Mr. Shepard: We haven't seen them before.

The Court: You will have 15 minutes to examine them.

(Testimony of James R. Yost.)

(Short recess taken.)

Cross Examination—(Resumed)

Q. (By Mr. Shepard): Mr. Yost—may I approach the witness, your Honor?

The Court: Yes.

Mr. Shepard: Did you state that Plaintiff's Exhibit No. 9 represented the out-bound or the in-bound weights? A. This is the out-bound.

Q. That is the out-bound? A. Yes.

Q. Now, calling your attention to the first three slips in said pad, will you state what those three slips represent as far as whose cattle were being hauled? A. You mean the name?

Q. I will change it. Strike that.

Your cattle were being hauled out-bound all by one truck [137] in three different loads, is that correct? A. That's right.

Q. Who did the hauling.

A. A man by the name of Kenneth Maze.

Q. And he used the same truck?

A. Yes, sir, he did.

Q. And those first three tickets represent the load of your cattle that went out?

A. That's right, yes.

Q. As distinguished from Mr. Stringer's cattle?

A. That's right.

Q. And if the same truck was used, the weights of that truck for those three trips should be relatively the same, should they not?

A. Well, they would vary some.

(Testimony of James R. Yost.)

Q. How much would they vary?

A. I don't know. I couldn't say.

Q. Well, you have been in the cattle business for 5 years and you have some opinion. You shipped some cattle, haven't you?

A. Well, the reason I can't say is because it depends upon how heavy the cattle—how soon they have been fed and the weights of the cattle can vary as to the weight that would be in the truck.

Q. Do you think the 12,000 pounds of cattle could cast [138] 7500 pounds worth of manure?

A. Well, I wouldn't know.

Q. Do you think it is possible?

A. I don't know.

Q. They would have to be pretty healthy cattle to do that, wouldn't they? A. I don't know.

Q. Do you think those cattle, which you thought were in such terrible shape when you pulled them out of there, could have cast 7500 pounds worth of manure?

A. I wouldn't know how much they would shrink, I don't know.

Q. They were starving, according to you, weren't they? A. I don't know.

Q. You don't know whether they were starving or not?

A. I didn't say they were starving. I said that they were in poor shape.

Q. They were so close to starving they were eating sand, weren't they, according to you?

A. That's right.

(Testimony of James R. Yost.)

Q. All right. How much manure would they probably lose in being trucked?

A. I wouldn't know.

Q. You wouldn't know?

A. No. I don't know how much they would lose.

Q. Now, do the tare weights on the truck for those three [139] slips show a 7500 pound differential in the tare weight of that one truck? Will you examine that exhibit and find out, please?

A. You are speaking about my cattle, are you?

Q. Those three slips which represent the shipping of your cattle.

A. This is the weight of the truck the entire truck and all.

Q. The tare weight?

A. The 75,000 you are talking about is the entire weight with the manure and everything in there? Isn't it?

Q. All right, let me have the exhibit, please.

A. You see, this is the entire weight of the truck.

Q. Now, referring to the slip which is marked 14324, what is the tare weight on that?

A. That is the tare weight.

Q. What is the number?

A. 21,000, that is the gross weight of the truck.

Q. The tare weight is the gross weight?

A. Of the truck.

Q. Of the truck without any load in it?

A. That's right.

Q. And referring to the slip which is numbered

(Testimony of James R. Yost.)

14318, what is the tare weight of the truck as shown on that slip? A. 20,800.

Q. 20,800? [140]

A. Yes.

Q. So that those two are substantially the same, are they not, 21,000 and 21,800—they are roughly in the same area?

A. This would represent part of the same truck.

Q. That would represent the same truck being weighed at different times, would it not?

A. That's right.

Q. Now, this slip that was marked 14322, that would also represent the same truck weighed at a different time? A. Not necessarily.

Q. Would it not?

A. You see, some of these trucks were semis, some of them were truck and trailers, and some of them were the short wheel base truck.

Q. Now, you just got through saying all of your cattle were shipped in the same truck, driven by the same man, Mr. Maze. Do you want to change that?

A. No, I meant they were shipped by the same fleet of trucks. It doesn't necessarily mean it is just one particular truck, because they all couldn't have been hauled in one truck in a month.

Q. Did this one truck driven by Mr. Maze make three different trips and pickup all of your cattle over those three trips? A. Let me see that.

Q. No, just state whether you know or not?

A. Well, I don't exactly know whether he used

(Testimony of James R. Yost.)

more than one truck or not, because he has got more than one truck. Now, it could have been one or two trucks.

Q. What is the tare weight of the truck as shown on that third slip we were referring to?

A. Well, we have one for 21,000, we have one for 28,430.

Q. No, what was that again? A. 28,430.

Q. All right.

A. And we have one for 20,800.

Q. Going to Plaintiff's Exhibit No. 10, Mr. Yost, would you tell me again what that is supposed—what supposedly consists of?

A. This consists of one bunch of cattle that was weighed.

Q. Out-bound or in-bound?

A. This is in-bound. These are all in-bound weights, all of them.

Q. And these were supposedly weights which were recorded by this livestock commission company?

A. That's right, that's the buying weights of those cattle.

Q. How many cattle does that cover?

A. This covers 97 head. This doesn't cover the complete 97 head. We are less the 20 head that I couldn't find the sale records on, which weighed 6,970. [142]

Q. Now, if you can't find the sales weights on those how do you know they weighed 6,970?

A. Because this figure was recorded in by books

(Testimony of James R. Yost.)

off of this very same kind of sales slip here you are looking at at the time I bought the cattle.

Q. What are these two small white slips attached? A. Those are scale weights.

Q. Off what scale?

A. Off the Nyssa scales at the Union Livestock Commission Company.

Q. At the Nyssa scales? A. That's right.

Q. Now, they do not carry the notation "Nyssa scales" on them, do they?

A. No, they don't, but that is where they are from.

Q. And there is no signature on those?

A. No.

Q. To indicate who made those?

A. No, there isn't. Probably was weighed by a truck driver that unloaded them and weighed them back.

Q. Again, referring to Plaintiff's Exhibit No. 10, and the two white slips that you have attached, is that your handwriting? A. Yes, sir, it is.

Q. So they were made by you?

A. No, they weren't made by me. [143]

Q. But they are in your handwriting. Now, all of these adding machine tapes, these were made by Mrs. Butcher when you went up there and talked?

A. I didn't say all of them. I said the inbound one, that 131,000, was made by Mrs. Butcher's adding machine.

Q. What date was that?

(Testimony of James R. Yost.)

A. I can't tell you the exact date.

Q. What room in the house was that tabulation made in?

A. That was made in the living room.

Q. In their dining room on what kind of an adding machine, what make of adding machine was it?

A. I don't know.

Mr. Shepard: That is all, if your Honor please.

Mr. Donart: Could I see the exhibits that had those three different tare weights?

Mr. Shepard: I will leave them all with Mr. Donart.

I would like at this time to renew my objection to the admission of any of those documents, on the ground that there has not been sufficient foundation laid; insofar as a record appears, they are nothing but hearsay evidence.

The Court: Overruled.

Redirect Examination

Q. (By Mr. Donart): Calling your attention to those three weigh tickets. [144] The first one, I believe, shows a gross weight of 39,206?

A. That's correct.

Q. And a tare weight of 28,430?

A. That's correct.

Q. And a net weight of the truck load of 11,830?

A. Yes, sir.

Q. Now, on your second one, doesn't it show a gross weight of 33,180?

A. Yes.

Q. And a net tare weight of 21,000?

(Testimony of James R. Yost.)

A. That's right.

Q. And on the third one a gross weight of 34,380 and a tare weight of 20,800?

A. Yes, sir.

Q. And on the second one it shows a net weight of the cattle 12,180? A. Yes, sir.

Q. Just a few hundred pounds more than the previous? A. That's right.

Q. And in the last one a net weight of cattle of 13,580? A. Yes.

Q. Now, state whether or not the gross weight of that truck, where the tare weight has increased as much as it has, the gross weight of the truck-load isn't nearly 5,000 pounds heavier than either of the others? [145]

A. I don't quite follow you, George.

Q. Here, 39,260, what is your next?

A. 33,180.

Q. And the next one 34,380? A. 34,380.

Mr. Donart: That is all.

Mr. Shepard: That's all.

(Witness excused.)

Mr. Donart: (To counsel) We have made a request for the production of a letter which we were advised that you had. May I have that letter?

(Discussion between counsel.)

(Whereupon, document was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Shepard: Your Honor, in the interest of

perhaps saving time, Mr. Donart evidently anticipates going through the formality of introducing that. We would stipulate at this time that the plaintiff, Mr. Yost, made demand on the defendant for payment of this note and mortgage.

The Court: Accept that?

Mr. Donart: No. We want to show our demand and their answer to it and how that answer differs from their later position.

The Court: All right, stipulation not accepted.

Mr. Donart: Now, I would like to have marked as [146] Plaintiff's Exhibit 5 (1) the first page of Plaintiff's Exhibit 5. It was admitted as part of another exhibit and admitted conditionally.

The Court: All right, it may be received and marked in the fashion you describe.

(Whereupon, document marked Plaintiff's Exhibit 5 (1) for identification.)

Mr. Donart: We now offer in evidence Exhibit No. 13 and 5 (1) and if the Court feels that foundation has been laid, we will ask permission to call Mr. Padgett to the witness stand and testify how he came by one of the letters.

The Court: Can't you stipulate to that?

Mr. Shepard: We would like to see the two letters together. I don't know what theory Mr. Donart is trying to put together again.

We will conditionally enter into a stipulation that the letters may go into evidence for what they purport to show, if Mr. Donart will stipulate as to later letters setting forth the position concerned, in the same year.

Mr. Donart: Why, sure.

Mr. Shepard: And the same people.

Mr. Donart: You wouldn't need my stipulation. they would be admissible. I just told you——

The Court: All the letters are in evidence. [147]

(Whereupon, Plaintiff's Exhibits Nos. 13 and 5 (1) for identification were received in evidence.)

(Discussion between counsel.)

Mr. Shepard: Will you produce that and place that in evidence?

(Discussion between counsel.)

Mr. Shepard: Is this a copy of the letter, Mr. Donart?

Mr. Donart: Yes, it is a true copy of the letter, I am sure.

Mr. Shepard: May we have this marked and go in, your Honor, as a true and correct copy?

The Court: You may.

Mr. Donart: No objection at all.

(Whereupon, letter was marked Defendants' Exhibit No. 14 in Evidence.)

Mr. Donart: We rest.

Mr. Shepard: I have a very brief witness.

GRACE A. BUTCHER

called as a witness, in surrebuttal, by the defendants, being first duly sworn, thereupon testified as follows:

The Clerk: Please state your name for the record?

A. Grace Alberta Butcher. [148]

Direct Examination

Q. (By Mr. Shepard): Where do you reside, Mrs. Butcher? A. Parma, Route 2.

Q. You are the wife of Clayton Butcher, the defendant in this action? A. Yes.

Q. Did you hear the testimony that has gone on preceding yours today? A. Yes.

Q. You were in the courtroom? A. Yes.

Q. Did you hear the testimony of Mr. Yost regarding your running an adding machine tape in your home, in your dining room?

A. I think he must be mistaken.

Q. You heard the testimony? A. Yes.

Q. Have you ever owned an adding machine?

A. No.

Q. To your knowledge has there ever been one in your home? A. No.

Q. Did you ever run an adding machine tape in your dining room? A. No. [149]

Q. Totaling up those so-called scale weights?

A. No.

Q. You did not? A. No.

Q. You never owned an adding machine of any type, description or make of any kind?

(Testimony of Grace A. Butcher.)

A. No. No.

Mr. Shepard: That is all.

Mr. Donart: No cross-examination.

(Witness excused.)

Mr. Shepard: That is all. The defendant rests.

Mr. Donart: So do we.

The Court: You may have 5 minutes apiece to argue the matter, if you want to.

Mr. Donart: I was going to add, there is very little question in here about foreclosure, and I was wondering if, instead of arguing this orally we couldn't submit it to the Court by a written memorandum, which I will agree to get into the mail by tomorrow night. I would like to check along and see if there has been any criticism of that case of York versus Roberts.

The Court: With reference to the ensilage, you mean?

Mr. Donart: Yes, the case as to whether you still have to foreclose. [150]

The Court: It seems to be ridiculous, Mr. Donart.

Mr. Donart: I thought it was ridiculous.

The Court: It's absolutely worthless, it is conceded it is worthless.

It might be a good idea to brief that, particularly to this extent, as to what extent I am to be bound by that decision under the federal rules.

Mr. Donart: That's right.

The Court: You want 5 days to reply to that, Mr. Shepard?

Mr. Shepard: No, if your Honor please, I can't see taking a position. I feel, if the Court please, it is ridiculous, the whole thing. What ever the Court's decision is, I don't know whether the Court wants to make it from the bench now or after Mr. Donart's submission. Whichever way is perfectly satisfactory with the defendant. I can't see that it makes any difference myself.

The Court: Why don't you wait and see, and in excess of caution, what Mr. Donart is going to say in his memorandum. I don't want to cut you off.

Mr. Shepard: With that understanding, may I have 5 days following receipt of Mr. Donart's?

Mr. Donart: My brief will be in the mail tomorrow night.

The Court: All right. I will take it up under [151] submission then with that understanding. Matter submitted.

Mr. Shepard: If your Honor please, the brief, as I understand it, is merely on this point as to what is done as far as foreclosing?

Mr. Donart: I was going to set forth in that just a brief statement of what I would argue here orally if I argued it today.

Mr. Shepard: Oh, in that case, I very definitely would want time. I misunderstood. I'm sorry.

The Court: I am not going to confine Mr. Donart or am I going to confine you to just one particular, precise point. You may argue it in the same fashion if you would if you were going to present it orally in open court.

Mr. Shepard: I understood that we were going to argue orally now on the other points. Such is not the case?

The Court: I don't think it would be necessary.

Mr. Donart: You would be arguing it piecemeal.

The Court: Do you want five days to answer that?

Mr. Donart: Well, if they raise new matter, give me one day to answer. [152]

[Endorsed]: Filed April 21, 1958.

[Endorsed]: No. 15998. United States Court of Appeals for the Ninth Circuit. James R. Yost, Appellant, vs. Alberta G. Morrow, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: April 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15998

JAMES R. YOST,

Appellant,

vs.

C. A. BUTCHER and ALBERTA G. MORROW,
Appellees.

DESIGNATION OF POINTS UPON WHICH
APPELLANT WILL RELY FOR RE-
VERSAL

Comes Now the Appellant and files his Designation of Points upon which he will rely for reversal of the Judgment made and entered in the District Court of the United States for the District of Idaho, Southern Division, as follows:

I.

The Trial Court erred in granting the Motion of the Appellee Morrow to dismiss the action as to her;

II.

The Trial Court erred in making and entering that portion of Finding of Fact number II which reads as follows:

“That said note was made, executed and delivered by the said defendant Alberta G. Morrow without consideration;”

III.

That the Trial Court erred in making and enter-

ing Conclusion of Law number 1 for the reason that there was a consideration for the signing of said note by appellee Alberta G. Morrow in that the law imports and implies such a consideration; that there was an actual consideration consisting of a detriment to the obligee in that he loaned the Appellee Butcher Seven Thousand Three Hundred (\$7,300.00) Dollars, because of the signature of the Appellee Morrow upon said note; that no consideration is necessary to authorized a recovery against an accommodation maker;

IV.

The Court erred in making and entering that portion of the Judgment entered in said District Court which reads as follows:

“That the above entitled action insofar as it affects the defendant Alberta G. Morrow be and the same is hereby dismissed.”

upon the grounds urged as error in making and entering Conclusion of Law number I;

Appellant's contentions are that the execution of the note by the Appellee Morrow is admitted by the pleadings; that the undisputed testimony shows that her signature on the note was demanded by the Appellant before he would make the loan; that the execution and delivery of a promissory note imports a consideration and a consideration is presumed; that the undisputed testimony shows that there was an actual consideration for the signature of the Appellee Morrow upon the note, to-wit, the making of the loan by the Appellant to the Ap-

pellee Butcher, the son-in-law of the Appellee Morrow; that the Appellee Morrow was an accommodation maker of said note and the fact that she, the accommodation maker, received no consideration for the execution or delivery of said note is no defense to an action thereon against her for its collection.

/s/ GEO. DONART,

/s/ JAMES B. DONART,

Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 7, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD NECESSARY
FOR DETERMINATION OF APPEAL

Comes Now, The Appellant and designates the following portion of the record as being all of the record which is material to the consideration of the appeal, to-wit:

The Judgment Roll consisting of:

The Complaint;

The Answer and Cross-Complaint;

The Answer to the Cross-Complaint;

The Amended Findings of Fact and Conclusions of Law;

The Judgment entered in the above entitled action.

The Reporter's Transcript of the testimony and proceedings taken at the trial of said action.

The Exhibits introduced and admitted on the trial of said action, particularly Plaintiff's Exhibits 1, 2, 3 and 4.

/s/ GEO. DONART,

/s/ JAMES B. DONART,

Attorneys for the Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 7, 1958. Paul P. O'Brien,
Clerk.

